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No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
OCTOBER TERM, 1983  
\_\_\_\_\_

KENNETH R. SNOW, ROY HULL and GUY SANSON,

Petitioners,

v.

QUINAULT INDIAN NATION, a/k/a  
QUINAULT TRIBE; QUINAULT TRIBAL  
COUNCIL; and EDYTH E. CHENOIS,

Respondents.

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
\_\_\_\_\_

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Questions Presented

- I. Does tribal jurisdiction extend to the original territorial boundaries of the reservation and include the power to tax a nonmember's activities on land owned in fee by that nonmember absent any other relationship between the nonmember's activities and the tribe?
- II. Does 25 U.S.C. § 1302(8), which provides that "No Indian tribe in exercising the power of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws . . . ." create a viable remedy in federal courts for non-Indians burdened by a discriminatory tribal tax?
- III. Do Fifth Amendment guarantees prohibit a federal delegation of power to Indian tribes which permits imposition of a discriminatory tribal tax on non-Indians?

Parties Below

Appellants in the Court below were Kenneth R. Snow, Roy Hull, Tim Adams, Guy J. Sansom, Floyd E. Davis, Larry F. Rasmussen, George Bertrand and Ronald P. Erickson.

Appellees were the Quinault Indian Nation, a/k/a Quinault Tribe, the Quinault Tribal Council, and the tribal revenue clerk, Edyth E. Chenois.



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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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The Petitioners respectfully pray  
that a Writ of Certiorari issue to  
review the decision of the United States  
Court of Appeals for the Ninth Circuit  
entered in this proceeding on July 7,  
1983.



OPINIONS BELOW

The opinion of the Court of Appeals is reported at 709 F.2d 1319, and is reproduced as Appendix A hereto. The Findings of Fact, Conclusions of Law, and Order on Summary Judgment, entered by the District Court for the Western District of Washington on September 29, 1980, are not reported, and are reproduced as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1983. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY  
AND OTHER PROVISIONS INVOLVED

Involved are: (1) United States Constitution, Amendment V (Appendix C hereto); (2) the Indian Civil Rights

Act, 82 Stat. 77, 25 U.S.C. secs. 1301-1303 (Appendix D); (3) the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. sec. 331 et. seq. (Appendices E and F); (4) the Quinault Allotment Act of 1911, 36 Stat. 1345 (Appendix G); (5) the Treaty of Olympia, 12 Stat. 971 (1855) (Appendix H); (6) the Executive Order of Nov. 4, 1873, 1 Kapp. 923 (Appendix I); (7) the Quinault Tribal Constitution (1975) (Appendix J); (8) Title 40, Quinault Tribal Code, Business License Ordinance (Appendix K); (9) the Rules under Quinault Tribal Code, Title 40 (1977) (Appendix L).

STATEMENT OF THE CASE

The Quinault Indian Reservation is located on the west side of the Olympic Peninsula, which forms the northwest portion of the State of Washington. The reservation was originally created by

the Treaty of Olympia, 12 Stat. 971 (1855), and was subsequently expanded to its present boundaries by the Executive Order of November 4, 1983, 1 Kapp. 923. The Quinault Indian Nation is a federally recognized Indian Tribe.<sup>1</sup>

The Tribe's reservation encompasses about 200,000 acres, consisting mostly of forest land. See, United States v. Mitchell, \_\_\_\_ U.S. \_\_\_\_ (1983), 51 L.W. 4999, 5000. By 1935, the entire Reservation had been allotted, under the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. §§ 331, et seq., into trust allotments, "most of which were 80 acres of heavily timbered lands." Id.

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<sup>1</sup>The History of the reservation is set forth in Halbert v. United States, 283 U.S. 753 (1931).

About a third of the Reservation has gone out of trust. Id.<sup>2</sup>

The Reservation is triangular in shape, with the base running roughly north and south for about twenty miles along the Pacific Coast, and the apex located about twenty miles due east of the Coast. Just inside this apex is the unincorporated community of Amanda Park. Petitioners are non-Indians who reside and conduct their businesses there, all on non-Indian lands which they own in fee. According to 1980 census data, Amanda Park has a population of 198 non-Indians and 26 Indians. (See Attachment C to Tribe's Brief in Court of Appeals) Running through Amanda Park

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<sup>2</sup>Although the entire Reservation was allotted, it appears that the Tribe subsequently acquired about 4000 acres. See, Mitchell v. United States, 219 Ct. Cl. 95, 591 F.2d 1300 (1979).

is U.S. Highway 101, the principal highway around the Olympic Peninsula, serving federal, state, other public, and non-Indian land as well as the Quinault Reservation.

The Petitioners own and operate various types of businesses in Amanda Park; Mr. Snow has a general store; Mr. Hull a cafe and tavern; and Mr. Sansom a service station. The businesses cater to the residents of Amanda Park and visitors to the area. The businesses have no formal or informal arrangements with the Tribe, but occasionally render services to individual tribal members on an incidental basis. Almost all business conducted by Petitioners is with non-Indians. Although the Tribe alleges that it provides various services and benefits to Petitioners, it has not established any direct relationship

between itself and Petitioners, nor a direct rendition of services to Petitioners.<sup>3</sup>

The Constitution of the Quinault Indian Nation asserts the sovereignty of the Tribe extends to ". . . all persons acting within the boundary of [the original reservation as created by treaty] . . . ." Article I, Section 1. In June 1977 the Quinault Tribal Council adopted a business license tax ordinance, applicable to all of Petitioners' businesses, pursuant to this sweeping assertion of sovereignty. The amount of the tax was multiplied by the number of the

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<sup>3</sup>For many years Petitioners have in fact received all services from Grays Harbor County and the State of Washington, including police and fire protection, and maintenance of state and local roads. The Tribe does not keep fire-fighting road equipment in or around Amanda Park -- the closest repository is some 25 miles away in Queets.

business's employees, if such business had two or more employees. Not all employees, however, counted equally; an employee who was a member of the Quinault Tribe counted at one rate while a non-member employee counted at double that rate.<sup>4</sup>

The Petitioners challenged the Tribe's attempt to impose the tax on several grounds, including, inter alia, the following: First, Petitioners contended that the Tribe was without the jurisdiction to tax nonmembers conducting business on non-Indian owned fee lands unless there was a significant involvement or consensual relationship between the Tribe and the nonmembers.

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<sup>4</sup>Thus, an employer of four tribal members would pay half the tax paid by an employer of four non-Indians. Mr. Snow has four non-Indian employees, including his wife. See App. L.

Second, Petitioners contended that the tax in question violated the equal protection guarantees of the Indian Civil Rights Act. Petitioners also contended that the imposition of the tax upon them, without affording them the right to participate in the tribal government, violated their rights under the United States Constitution.

The District Court considered Petitioners' challenge and the motion to dismiss which had been initiated by the Tribe as cross-motions for summary judgment. After considering evidence introduced by both parties, including contradictory affidavits as to the relationship between the Petitioners and the Tribe and the services it rendered, the District Court ruled in favor of the Tribe.



Upon appeal the Ninth Circuit affirmed. The Court below rejected Petitioners' claim that the Tribe lacked the jurisdiction to impose any tax upon them in the absence of the requisite relationship with the tribe based on its reading of this Court's decision in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).<sup>5</sup> In disposing of Petitioners' claim that the tribal tax violated the equal protection guarantees of 25 U.S.C. § 1302(8), the Court below

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<sup>5</sup>The court below cast its holding in terms of tribal sovereign immunity from suit. That is, it viewed tribal sovereign immunity as barring the Petitioners' claim if imposition of the tax upon them was within the Tribe's power, and as not barring the claim if the tax was not within the Tribe's power. Thus, its application of the doctrine of tribal sovereign immunity was really a ruling on the scope of tribal taxing power. See App. A, p. A-4. Because of the nature of its holding, the Court below did not remand for a resolution of the conflicting evidence of the relationship between the Petitioners and the Tribe.

held that the only relief available in federal courts for an alleged violation of the Indian Civil Rights Act, even for non-Indians, is that of habeas corpus pursuant to 25 U.S.C. § 1303. In so holding, the Court below relied upon Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), as well as its own prior decisions construing that case.

REASONS FOR GRANTING THE WRIT

- I. THE DECISION OF THE COURT BELOW DEPARTS FROM THE ESTABLISHED HOLDINGS OF THIS COURT, RESULTING IN THE DENIAL OF PETITIONERS' CIVIL RIGHTS.

This Court, particularly over the past few years, has carefully endeavored to define the often delicate balance between an Indian tribe's sovereignty and its dependent status. The Court below has misinterpreted this Court's work, thereby granting overly broad tribal jurisdiction, denying petitioners a

remedy by which to vindicate their constitutional and federal rights, and creating the opportunity for further abuse of the power erroneously granted to Indian tribal governments.

A. Limitations on Tribal Civil Jurisdiction Over Non-Indians on Non-Indian Owned Fee Land Constitute An Issue of Nationwide Importance That Must be Resolved by This Court.

This Court has consistently recognized that an Indian tribe's jurisdiction over nonmembers is limited:

. . . the Indian tribes have lost "any right of governing every person within their limits except themselves." [Fletcher v. Peck, Cranch 87, at 147], Oliphant v. Suquamish Indian Tribe, . . . 435 U.S. at 209. Although Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

Montana v. United States, 450 U.S. 544, 565 (1981) (emphasis supplied, footnote omitted).

The Court below has chosen to ignore these well-settled principles. See, United States v. Wheeler, 435 U.S. 313 (1978), Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. 191 (1978), Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), and Montana v. United States, supra, 450 U.S. 544. Although the Court below bases its opinion on this Court's decision in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (Stevens, J., Burger, CJ., and Rehnquist, J., dissenting), in fact its reading of Merrion is aberrational and results in an irresponsible and drastic departure from the principles set forth by this Court in Merrion and its predecessors.

The delineation of the jurisdictional relationship between a tribe and a nonmember has recently been the sub-

ject of increasing clarification by this Court. In United States v. Wheeler, supra, 435 U.S. 313, this Court upheld the power of a tribe to punish tribal members who violate tribal laws, but at the same time was careful to note that the Indian tribes have lost many of the attributes of sovereignty, particularly in areas involving the relations between an Indian tribe and nonmembers. In Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. 191, this Court held that tribes are without criminal jurisdiction over nonmembers. In Washington v. Confederated Tribes of Colville, supra, 447 U.S. 134, this Court noted that tribes have a "broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. . . ." and thus upheld the tribe's right to impose a tax

on transactions involving sales by tribal members on tribal lands. Id. at 152 (emphasis added).<sup>6</sup> And in Montana v. United States, supra, 450 U.S. 544, citing both Oliphant and Colville, supra, this Court held that the tribe did not have authority to regulate non-Indian hunting and fishing on non-Indian-owned fee lands lying within the exterior boundaries of the reservation. In so doing this Court explained the limits of a tribe's extension of civil jurisdiction to nonmembers:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

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<sup>6</sup>This Court's holdings in Colville and Oliphant indicate that economic impact on a tribe, even where significant, does not constitute the requisite "significant interest."

Montana, 450 U.S. at 565. Tribal jurisdiction may also be extended to the conduct of a nonmember on fee lands:

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id., at 566.

In Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. 130, this Court merely applied these principles to the activities of oil and gas lessees on tribal lands pursuant to a contractual relationship with the tribe. The activities of the lessees took place on tribal lands, were governed by the terms of the contract with the tribe, and the lessees were found to have received the benefits and services of tribal government. In such cases, a tribe's juris-



diction is clear, and was accordingly so held by this Court.

Incredibly, the Court below misinterpreted the Merrion decision, eliminating the limitations this Court has previously placed on tribal jurisdiction, and giving the Quinault Tribe carte blanche power to tax any activity within the original exterior boundaries of the reservation. Not only has the Court below considered Merrion in a vacuum, it has disregarded the factual underpinnings of that case and the well-reasoned opinion of this Court. Instead the Court below relies on selected statements taken out of context:

...[the tribe's power to tax]  
"derives from the tribe's general  
authority, as sovereign, to control  
economic activity" on the reservation....

\* \* \*

...The fact that the tax is levied  
against businesses, many of which



are non-Indian owned and located within reservation boundaries, does not make the tax one which is outside the boundaries of the Tribe's sovereign powers.

The distorted result that follows from such treatment is untenable and must be corrected by this Court.<sup>7</sup>

B. Allowing the Tribe Unrestricted Power to Tax Petitioners Runs Contrary to the Policies of the General Allotment Act.

The decision of the Court below also disregards federal law and policy by which Petitioners originally were invited to take title to the land.

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<sup>7</sup>The District Court's opinion apparently follows the guidelines set forth by this Court. However, its decision cannot stand. The issues raised by each side were treated by the District Court as cross-motions for summary judgment. Snow v. Quinault Indian Nation, see, Appendix B, at A-13. Yet despite conflicting evidence of the relationship between the Tribe and Petitioners, the District Court granted respondents' motion. The Ninth Circuit avoids this procedural issue by giving the Tribe the right to tax nonmembers regardless of underlying facts.

Petitioners hold title to their lands in fee pursuant to the General Allotment Act (Act of Feb. 8, 1887, Ch. 119, § 6, 24 Stat. 390, as amended, Act of May 8, 1906, Ch. 2348, 34 Stat. 182, 25 U.S.C. §349). This Act was designed eventually to eliminate tribal relations by providing that

" . . . when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, . . . ."

Id. Accordingly this Court has noted:

There is simply no suggestion in the legislative history that Congress intended that non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. [Citations omitted.] It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when

an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana v. United States, supra, 450 U.S. at 559, n.9. Although the policy of allotment was later repudiated, ". . . what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." Id.

C. The Decision of the Court Below Extends Jurisdiction on the Mistaken Assumption That a Tribe's "Inherent Sovereign Powers" Are Derived from Concepts of Territoriality.

The decision of the Court below threatens to extend a tribe's "inherent sovereign powers" to the original territorial boundaries of "Indian Country." In so doing, the Court below confuses the true basis of tribal sovereignty by misapplying notions derived from Anglo-American theories of property rights.

As this Court has pointed out, one must avoid "reliance on platonic notions of Indian sovereignty. . . ." McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172 (1973)

The Indian sovereignty doctrine is relevant . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

Id.

"Sovereignty" is not a legal right unto itself, but a concept useful in describing a political reality from which legal consequences may flow. It is the consent of the governed to be so, together with their recognition of the governing institution - whether it takes the form of a monarch, elected assembly or council of elders - as the ultimate source of law in the society in which they live. Courts neither grant nor

take away sovereignty; if and when the governed no longer recognize the particular institution as their ultimate source of law, nothing a court may say would secure sovereign power to an institution no longer respected. Courts may only use the concept of sovereignty as a backdrop for the basis of their decisions.

Tribes are not "sovereign" in the true sense of that term as being the sole and ultimate source of law which is not itself bound by law. The term "sovereignty" in the context of Indian tribal government ". . . means no more than within the will of Congress."

United States v. Blackfeet Tribe of Blackfeet Indian Reservation, 365 F. Supp. 192 (D. Mont. 1978); see also, Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. at 208-211; Santa Clara

Pueblo v. Martinez, supra, 436 U.S. at 56.

Consider: The nature of an Indian tribe is that of a social group composed of numerous families, clans, bands, or villages who are held to descend from a common ancestor and possess cultural, religious, and linguistic homogeneity. A nation-state, in contrast, is a politically organized territory which may or may not have the homogeneity characteristic of a tribe. Territoriality is the prevailing determinant of which sovereign controls in the case of a nation-state, whereas the primary determinant in the case of a tribe is the personal status and relationship of the individual to the tribe. Tribal sovereignty is personal, not territorial. As stated by the Solicitor General, when faced with the question of whether an Indian court

could exercise jurisdiction over acts committed by an Indian on lands within the reservation but no longer held in trust:

That the original sovereignty of an Indian Tribe extended to the punishment of a member by the proper Tribal officers for depredations or other forms of misconduct committed outside the territory of the tribe cannot be challenged. Certainly, we cannot read into the laws and customs of Indian Tribes a principle of territoriality of jurisdiction with which they were totally unfamiliar, and which no country has adopted as an absolute rule.

Opinion of the Solicitor for the Department of the Interior, April 27, 1939.

The consequences of the distinction between personally and territorially defined sovereignty focus on who is subject to tribal power, rather than on defining what that power includes. Thus, it has been held that a tribe may punish its members for offenses committed outside the territorial bounda-

ries of the reservation, Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974), but may not punish nonmembers who commit crimes against members on reservation lands. Oliphant v. Suquamish Tribe, supra, 435 U.S. 191.

Concepts of sovereignty based on personal relationships and the policies of the General Allotment Act combine to reinforce this Court's conclusions that tribal jurisdiction over nonmembers must be based on something more than a non-member's fee patent ownership of lands located within the original boundaries of a reservation. The territorial assertions relied on by the Court below are flatly inconsistent with this Court's holding in Montana v. United States, supra, 450 U.S. 544. The Court below ignores the articulated principles of Oliphant, Montana, Colville and



Merrion, creating problems that must be resolved by this Court.

II. THE DECISION OF THE COURT BELOW STANDS IN DIRECT CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN DRY CREEK LODGE, INC. V. ARAPAHOE AND SHOSHONE TRIBES AND RAISES ISSUES OF FEDERAL LAW AND CONSTITUTIONAL GUARANTEES THAT MUST BE RESOLVED BY THIS COURT.

A. The Decision of the Court Below Improperly Limits Non-Indians Subjected to a Discriminatory Tribal Tax to the Remedy of Habeas Corpus.

This Court has determined that the policies underlying the Indian Civil Rights Act require that for tribal members involved in internal tribal matters, the only remedy afforded in federal courts for violations of the Act is that of habeas corpus. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (White, J., dissenting).

With its decision, the Court below subjects petitioners to the jurisdiction

of tribal government and effectively eliminates all avenues of federal redress otherwise guaranteed nonmembers. Without examining the different policy considerations that must apply to nonmembers, the Court below has extended the holding of Santa Clara to cover situations involving not only nonmembers, but issues unrelated to the types of internal tribal matters that concerned this Court in Santa Clara. The Court below held that

In Santa Clara . . . , the United States Supreme Court specifically held "that §1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." Santa Clara, 436 U.S. at 72. In so ruling, the Supreme Court foreclosed any reading of the ICRA as authority for bringing civil actions in federal court to request other forms of relief. The tribal court is the proper forum for "the exclusive adjudication of disputes affecting . . . interests of both Indians and non-Indians." Santa Clara, 436 U.S. at 65.

In contrast the Tenth Circuit has examined the necessity of providing a federal remedy to nonmembers whose rights have been violated by actions of a tribe unrelated to internal tribal matters. Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. den. 449 U.S. 1118 (1981). The Tenth Circuit recognized that in Santa Clara

The issue and control was on the basis of ownership, tribal membership, and tribal use of its own lands. The problem was thus strictly an internal one between tribal members and the tribal government relating to the policy of the Tribe as to its membership. Of course, there were no non-Indians concerned.

. . . Much emphasis was placed in the [Santa Clara] opinion on the availability of tribal courts and, of course, on the intratribal nature of the problem sought to be resolved. With reliance on the internal relief available the Court in Santa Clara places the limitations on the Indian Civil Rights Act as a source of a remedy. But in the absence of such other relief or

remedy the reason for the limitations disappears.

The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian."

Dry Creek Lodge, supra, at 685 (emphasis added).

The decision of the Court below stands in contrast to the opinion of the Tenth Circuit and places in issue the question of remedies available to non-Indians under the Indian Civil Rights Act. Resolution of this conflict is necessary to ensure that the rights and remedies guaranteed to non-Indians remain unimpaired by extending tribal jurisdiction.

B. The Decision of the Court Below Undermines the Policies of the Indian Civil Rights Act and Permits Discriminatory Taxation.

The Indian Civil Rights Act was intended to secure the broad constitu-

tional rights afforded to litigants appearing before federal and state courts to litigants appearing before Indian tribal courts, and to protect individuals subject to their jurisdiction from the injustices perpetrated by tribal governments. Santa Clara, supra at 61, 66; S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967); Summary Report of Hearings and Investigations pursuant to S. Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966), at 11. To the extent that tribal governments have jurisdiction over non-members, the ICRA also protects their rights. Pursuant to the Act, § 1302 provides

No Indian tribe in exercising powers of self-government shall -

\* \* \*

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

The Quinault tax, on its face and in its operation, violates petitioners' ICRA rights; it is a particularly onerous example of discriminatory treatment. The tax is assessed on a per-employee/per-activity basis, established at a base rate for employees who are members of the Tribe, but doubled for nonmember employees. The inequity of this system becomes more apparent when the potential for further abuse is considered: what is to keep the Tribe from imposing the tax on nonmembers at four or five or ten times the base rate -- or not to tax members at all?<sup>8</sup>

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<sup>8</sup>For instance, although "most of its lands are valuable primarily for their timber resources" (Tribe's Brief to the Ninth Circuit), the Tribe does not tax extracting activities on trust lands. Having effectively exempted tribal members engaged in such activities, the tax burden is left to fall on nonmembers on fee patent lands.

In a case such as this, where a tribe is seeking to apply a discriminatory tax to a nonmember conducting business on fee patent land, and where there is no significant involvement or consensual relationship between the nonmember and the tribe, the remedy of habeas corpus is not sufficient to secure protection against discriminatory taxation and some other relief for the nonmember must be made available. Consider the following:

First, federal and constitutional policies, as interpreted by this Court, require that

. . . where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust remedies so as to grant the necessary relief. Bell v. Hood, 327 U.S. [678], at 684.

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 338, 392 (1971).

Second, an express purpose of the ICRA is to promote tribal self-government. Santa Clara, supra, 436 U.S. at 59, 62.<sup>9</sup> However, in this case the limitations on remedies imposed by the Court below defeat this stated purpose. The tribal court is being asked to exercise its judgment on complex legal issues without the benefit of appropriate training and experience; this is unfair to both the court and the litigants before it. Decisions rendered by a tribunal without sufficient expertise generally face a greater potential for reversal by a higher court. In turn, the lower tribunal's ability to rule with confidence

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<sup>9</sup>In support of this purpose this Court held that in intratribal matters where the expertise of a tribal court is indispensable, and its authority should not be undermined, limiting relief to habeas corpus is appropriate. Santa Clara Pueblo v. Martinez, supra, 436 U.S. 49.



is damaged, and it loses the respect of those that appear before it.<sup>10</sup>

Third, and most significantly, the decision of the court below leaves both the tribal court and the nonmember litigants before it without a remedy. Under consideration is the case of a nonmember, presumably subject to the civil jurisdiction of the tribal court, but involved in issues unrelated to internal tribal affairs, and indeed, not involved with the tribe on any significant level. If remedy under the ICRA is limited to habeas corpus, the nonmember is put in the extraordinary position of having to get himself arrested in order to have a remedy available. Yet as this Court

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<sup>10</sup>Although respondents may contend, and perhaps rightfully so, that the tribal court in question is in fact quite competent, as a practical matter, this tribal court is more the exception than the rule. See, Oliphant v. Suquamish Tribe, supra, 435 US at 211-212.

noted in Montana, under the holding of Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. 191, the tribe would be without the authority to enforce criminal penalties against the nonmember. Montana v. United States, supra, 450 U.S. at 565, n.14. The nonmember is left without any remedy. Equally important is the dilemma faced by the tribal court: it is hampered in its ability to enforce its decision against the nonmember.<sup>11</sup> This result cannot have been

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<sup>11</sup>Title 40, the Business License Ordinance, provides that the tribe may revoke the license of any "taxpayer" who has failed to pay the required fees or taxes, or failed to comply with any other provisions of the Ordinance. ¶40.10. Upon conviction for violation or failure to comply with the provisions of the Ordinance, a non-Indian "shall be punished by eviction from the reservation premises ...." ¶40.11. The effectiveness of these means of enforcement is questionable at best. Certainly the tribe has no power to evict a landowner from his fee patent land.

intended by the drafters of the Indian Civil Rights Act or the Santa Clara opinion. This Court must determine how a nonmember's constitutional rights are best guaranteed and the policies underlying the Indian Civil Rights Act are best served when tribal jurisdiction is extended to nonmembers.

III. THE GUARANTEES OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION PROHIBIT THE CONGRESS FROM AUTHORIZING OR ALLOWING AN INDIAN TRIBE TO IMPOSE THE VERY TAX MADE PERMISSIBLE BY THE DECISION OF THE COURT BELOW.

Although the federal Constitution does not apply directly to Indian Tribes, it certainly applies to actions of the federal government itself, including those of the Congress. Further, the relationship between the federal government and the federally recognized Indian Tribes is, we submit, even closer than the relationship

between the governmental body and its lessee in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The federal government is even more implicated in the actions of Indian tribes than was the public parking authority in the discriminatory actions of its lessee in Burton.

The constitutional problem here stems from two facts. The Petitioners here are reservation residents, but are not tribal members. Accordingly, they cannot participate in the tribal government to which they are subject, either through the ballot box or through any other means. Secondly, the taxing power here asserted by the Tribe is but one aspect or facet of a much more general assertion of governmental power. As stated in Article I, § 1 of the Quinault Constitution, which is entitled "Sover-

eignty," ". . . the jurisdiction and governmental power of the Quinault Nation shall extend to: . . . all persons acting within the [reservation] boundaries. . . ." Similarly the court below stated that the taxing power "'derives from the tribe's general authority, as sovereign, to control economic activity' on the reservation . . . ." App. A, p. A-6, quoting from Merrion, 455 U.S. at 137.

As shown by the various opinions in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), the broader the assertion of governmental power, the more serious becomes the fundamental constitutional problem of insuring the legitimacy of that power. When government asserts its power over those who cannot participate in that government through the ballot box, such assertion

becomes unconstitutional, as a denial of equal protection and a deprivation of property without due process of law. The decision of the Court below endorses this constitutionally impermissible assertion of power.

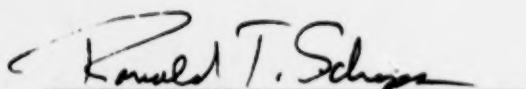
### CONCLUSION

In recent years this Court has addressed and resolved major issues regarding the powers of Indian Tribes over those who live or do business on their reservations. The issues presented in this case are no less important than the issues previously addressed, and indeed must be resolved by this Court in order to clarify the scope of its prior decisions. Not just important questions of Indian law, but important questions of basic civil rights are not involved as well. The basic civil rights of non-Indian reser-

vation residents, such as the Petitioners, and the unfettered tribal governmental power here asserted over them, simply cannot co-exist.

Accordingly, the Petition for a Writ of Certiorari to Review the Decision of the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Ronald T. Schaps", is written over a horizontal line.

RONALD T. SCHAPS  
BOGLE & GATES

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KENNETH R. SNOW, ROY HULL,	)	
TIM ADAMS, GUY J. SANSOM,	)	No. 81-3042
FLOYD E. DAVIS, LARRY F.	)	
RASMUSSEN, GEORGE BERTRAND,	)	D.C. No.
RONALD P. ERICKSON, and	)	C 77-138-T
all others similarly	)	
situated,	)	<u>OPINION</u>
Plaintiffs-Appellants	)	
v.	)	
QUINAULT INDIAN NATION,	)	
a/k/a QUINAULT TRIBE,	)	
QUINAULT TRIBAL COUNCIL,	)	
and EDYTH E. CHENOIS,	)	
Defendants-Appellees.	)	

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Appeal from the United States District Court  
for the Western District of Washington  
Jack E. Tanner, District Judge, presiding  
Argued and submitted January 6, 1982  
Resubmitted March 21, 1983

Before: ANDERSON and ALARCON, Circuit  
Judges, and REDDEN\*, District  
Judge

ALARCON, Circuit Judge:

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\*James A. Redden, United States District  
Judge for the District of Oregon, sitting  
by designation.



Kenneth R. Snow (Snow) appeals from an order of the district court granting summary judgment in favor of the Quinault Indian Tribe (the Tribe). Snow raises the following issues on appeal: (1) The district court has jurisdiction to entertain Snow's claim against the Quinault Nation; (2) The Tribe does not have the power to impose the business tax in question; and (3) The tax imposed by the Tribe denies Snow equal protection under the law in violation of 25 U.S.C. § 1302(8)

I. FACTUAL BACKGROUND

Snow and other non-Indian business owners, whose businesses are located on fee lands within the Quinault Reservation, commenced this action against the Tribe seeking injunctive and declaratory relief as well as extensive monetary damages. At issue is the Tribe's proposed implementation of a business license fee and tax on business activities within the Reservation. The Tribe seeks to raise revenue for the support of tribal governmental services through this tax. The tax is to be imposed on Indian and non-Indian businesses alike and is calculated by multiplying a base tax rate figure times the number of

non-Indian employees and adding that figure to one-half the base rate times the number of Indian employees.

Following the initiation of Snow's action, the Tribe moved the district court to dismiss for failure to state a claim upon which relief can be granted. Shortly thereafter, Snow moved for summary judgment. The district court determined that no genuine dispute as to any material fact existed and granted summary judgment in favor of the Tribe. Upon the district court's denial of Snow's motion for reconsideration, this appeal followed.

## II. SUBJECT MATTER JURISDICTION

The district court correctly determined that the claim set forth sufficient facts to give it subject matter jurisdiction pursuant to 28 U.S.C. § 1331. This section gives the district court jurisdiction over "civil actions arising under the Constitution, laws or treaties of the United States." See Cardin v. De La Cruz, 671 F.2d 363, 365 (9th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 103 S.Ct. 293 (1982).

At the core of Snow's claim is the extent to which an Indian tribe in exercising inherent sovereign authority can assert

civil jurisdiction over non-Indians. The limits of tribal sovereignty have been the subject of considerable litigation in recent years. Increasingly, the legal boundaries of tribal sovereignty are being defined by case law. See, e.g., Montana v. United States, 450 U.S. 544 (1981) (Supreme Court limited the extent to which the Crow Tribe could regulate non-Indian hunting and fishing on non-Indian reservation fee lands.); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians). Federal question jurisdiction can be based on case law. Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972). As Snow's action raises the issue of tribal sovereign powers, a sufficient federal question is presented upon which to base § 1331 jurisdiction. See Cardin, 671 F.2d at 365.

### III. TRIBAL SOVEREIGN IMMUNITY

The dispositive issue before this court is whether tribal sovereign immunity bars Snow's action from being addressed in the federal district court.

The Tribe contends that Snow's suit

must be dismissed on the basis of sovereign immunity. We agree. That Indian tribes possess immunity from suit in state or federal courts has long been settled. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). In addition, tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority. United States v. Oregon, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981). However, tribal sovereign immunity is not absolute. Rather, immunity from suit is similar to other aspects of tribal sovereign powers. Immunity exists only at the sufferance of Congress and is subject to complete defeasance. United States v. Wheeler, 435 U.S. 313, 323 (1978); United States v. Oregon, 657 F.2d at 1013. A tribe may also waive its immunity to suit. Id. An expression of waiver must be unequivocal; waiver cannot be implied. Santa Clara Pueblo v. Martinez, 436 U.S. at 58. However, tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers.<sup>1</sup>/ Swift Transportation Inc. v. John, 546 F. Supp. 1185, 1188 (D. Ariz. 1982).

The Quinault Tribe has not consented to be sued or waived sovereign immunity in this action; nor has the Tribe been divested of its immunity by Congress. Therefore, if the enactment and implementation of a business tax is within Tribal sovereign powers, Snow's action is barred. Accordingly, we next examine the Tribe's inherent power to tax.

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Supreme Court held: "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services." Id. at 137. The Court further stated that this power "derives from the tribe's general authority, as sovereign, to control economic activity" on the reservation as well as "to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." Id.

The Merrion decision cites with approval Buster v. Wright, 135 F. 947 (8th

Cir. 1905), appeal dismissed, 203 U.S. 599 (1906), an early decision upholding tribal power to tax non-Indians. The Merrion court states that "[e]ven though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the [Buster] court held that the Tribe retained its power to tax." Merrion at 143.

The Quinault business license fee and tax at issue in this appeal are aimed at raising revenue to support Tribal government services. The fact that the tax is levied against businesses, many of which are non-Indian owned and located within reservation boundaries, does not make the tax one which is outside the boundaries of the Tribe's sovereign powers. The holding in Merrion makes clear that the Quinault tax is a valid exercise of inherent sovereignty. Consequently the Tribe retains sovereign immunity from suit in this action.

Appellant Snow contends, however, that sovereign immunity was waived when Edith Chenois (Chenois), the Tribe's Revenue Clerk, consented to service of process as a

defendant in the district court.

Chenois was joined as a party to this action in her official capacity as Tribal Revenue Clerk. There has been no allegation that Chenois exceeded the scope of her authority. As tribal immunity extends to tribal officers acting in their official capacity and within the scope of their authority, United States v. Oregon, 657 F.2d at 1012 n.8, Snow cannot now avoid the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity. See Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949).

The issue then becomes whether a tribal officer's acceptance of service affects the sovereign immunity of the Tribe. The Supreme Court stated in United States v. United States Fidelity Co., 309 U.S. 506 (1940):

It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that [their] immunity cannot be waived by officials. If the contrary were true, it would subject the Government



to suit in any court in the discretion of its responsible officers. This is not permissible.

Id. at 513.

We find that the actions of Chenois do not affect the sovereign immunity of the Tribe. The Tribe has not waived sovereign immunity in this matter. Therefore sovereign immunity operates to bar Snow's action in the district court.

IV. JURISDICTION TO HEAR CLAIMS UNDER THE INDIAN CIVIL RIGHTS ACT

Snow contends that the manner in which the Tribal business tax is to be implemented denies equal protection of the laws in violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(8).2/ Specifically, Snow claims that taxing employers at a lower rate for employing Indians rather than non-Indians, is discriminatory.

Ninth Circuit law is well settled regarding claims under the ICRA. The only express remedial provision available to a party seeking relief in federal courts for an alleged violation of the ICRA is through application for habeas corpus relief under 25 U.S.C. § 1303. Boe v. Fort Belknap Indian Community of Fort Belknap,



642 F.2d 276, 278-79 (9th Cir. 1981); Trans-Canada Enterprises, Ltd. v. Muckle-shoot Indian Tribe, 634 F.2d 474, 476 (9th Cir. 1980).

In Santa Clara Pueblo v. Martinez, the United States Supreme Court specifically held "that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." Santa Clara, 436 U.S. at 72. In so ruling, the Supreme Court foreclosed any reading of the ICRA as authority for bringing civil actions in federal court to request other forms of relief. The tribal court is the proper forum for "the exclusive adjudication of disputes affecting . . . interests of both Indians and non-Indians." Santa Clara, 436 U.S. at 65.

The Supreme Court in Santa Clara acknowledged the dual objective that Congress had in enacting the ICRA. Congress sought to strengthen the position of individual Indians with respect to the tribe, as well as "promote the well-established federal 'policy of furthering Indian self-government'." Santa Clara, 436 U.S. at 62 (quoting Morton v. Mancari,

417 U.S. 535, 551 (1974). Although Congress can specifically authorize civil actions to be brought in federal court for alleged violations of § 1302, no such authorization has been granted by Congress in this instance. Therefore the parties must petition the Indian tribal court for relief under the ICRA.

Snow has not submitted his ICRA denial of equal protection claim to the Quinault tribal court for adjudication. He cannot now avoid the tribal court by claiming that the district court properly has jurisdiction over this ICRA claim. Congress intended tribal courts to decide ICRA claims which affect interests of both Indians and non-Indians in the first instance, subject to habeas corpus review.

The district court acted properly in granting summary judgement.

AFFIRMED.

#### FOOTNOTES

1/ As stated, Tribal sovereign powers are subject to defeasance by Congress. Tribal conduct may also be beyond the scope of sovereign powers, if sovereignty is restricted by treaty provisions, United States v. Wheeler, 435 U.S. 313, 323-24 (1978), or by portions of the Constitution

found "explicitly binding" on the tribes. Trans-Canada Enterprises, Ltd. v. Muckle-shoot Indian Tribe, 634 F.2d 474, 476-77 (9th Cir. 1980). In addition, Indian tribes have been specifically divested of some attributes of sovereignty due to their dependent status. See, e.g., Montana v. United States, 450 U.S. 544 (1981); Oli-phant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

2/ 25 U.S.C. § 1302(8) provides in pertinent part as follows:

No Indian tribe in exercising the power of self-government shall -

(8) deny to any person within its jurisdiction the equal protection of its laws. . . .

APPENDIX B

UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

KENNETH SNOW, et al.	)	
	)	CIVIL ACTION
v.	)	FILE NO.
	)	C77-138T
QUINAULT INDIAN NATION,	)	
et al.,	)	
<hr/>		JUDGMENT

This action came on for Consideration before the Court, Honorable JACK E. TANNER, United States District Judge, presiding, and the issues having been duly Considered and a decision having been duly rendered,

It is Ordered and Adjudged that Defendant's motion for Summary Judgment is GRANTED.

DATED at Tacoma, WA., this 29th day of September, 1980.

BRUCE RIFKIN  
Clerk of Court

/s/ Debby Harrison  
Deputy

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KENNETH SNOW, ET AL.,	)	
Plaintiffs,	)	NO. C77-138T
v.	)	
QUINAULT INDIAN NATION,	)	ORDER
Defendants.	)	
	)	

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THIS MATTER comes on for consideration before the undersigned judge of the above-entitled court upon Plaintiff's Motions to Alter or Amend Judgment and For Oral Argument. Having considered the aforesaid motions, together with the moving party's memoranda and affidavits, Defendant's memoranda in opposition, and the entirety of the records and files herein, the Plaintiff's Motions are DENIED.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

Dated this 24th day of December, 1980.

/s/ Jack E. Tanner  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KENNETH SNOW, et al.,	)	
Plaintiffs,	)	No. C77-138T
v.	)	
QUINAULT INDIAN NATION,	)	FINDINGS OF FACT,
et al.,	)	CONCLUSIONS OF
Defendants.	)	LAW, AND ORDER OF
	)	SUMMARY JUDGMENT

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Plaintiffs, several non-Indians and an Indian, seek a ruling that they are immune to the Quinault Indian Nation's business license and tax. Plaintiffs originally commenced this action against the Quinault Indian Nation, which has raised the defense of sovereign immunity. The Court does not reach this issue as jurisdiction does exist over the Defendant Edythe Chenois, Quinault Revenue Clerk, who was impleaded as a Defendant with the consent of the parties. With this modification, the Court finds that it has jurisdiction over the parties and the subject matter. This case is presented on Plaintiffs' motion for summary judgment, and Defendant's motion to dismiss for failure to state a claim on which relief can be granted, which is treated as a motion for summary judgment in view of the affidavits (sic) and other

documents submitted by both parties. F.R.C.P. 12(b). The Court has considered the briefs and cases cited by the parties and makes the following findings of fact, conclusions of law, and order.

All of the Plaintiffs do business within the Quinault Reservation. Several of the Plaintiffs do business on fee land within tourist community located adjacent to Lake Quinault. Both the Lake and Amanda Park are within the Reservation's boundaries. Two other Plaintiffs engage in the practice of law within the boundaries of the Reservation and at least one of them seeks to appear in the Quinault Tribal Court.

The tribal business license and tax, Title 40 of the Quinault Tribal Code, is imposed on both Indians and non-Indians for the privilege of doing business within the Quinault Reservation. See Quinault Constitution, Article V, Section 3(c). In addition to the \$5 annual license fee, a tax is imposed on persons and entities doing business within the Reservation, measured by the number of persons employed in the business within the Reservation, measured by the number of persons employed in the business within the Reservation's boundaries. In order to encourage busi-

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nesses to employ Indians, the tax due for any employee is reduced by one-half the base rate if the employee is an enrolled member of an Indian tribe.

The Quinault Reservation is composed of approximately 190,000 acres. About two-thirds of the Reservation remains in trust. The remaining one-third has passed out of trust. Most non-trust lands are owned by timber companies as the primary economic value of most of these lands is in their timber resource. The Quinault Department of Natural Resources and Economic Development provides a fire watch, fire fighting equipment and personnel to fight forest fires for both fee and trust lands and exercises regulatory control over forest practices that can damage timber and fish resources. Economic analyses show that more than ninety-five percent of the jobs and dollar value on the Reservation are generated by wood harvesting and processing. Affidavit of Warren Shale, Appendix E to Defendants Memorandum Opposing Both Amendment of Complaint and Substitution of Documents. The tribal police department provides a trespass patrol protecting against the theft of



timber on fee and trust lands. Appendix G, affidavit of Wilson Wells.

The tribal government provides police, fire, ambulance, social services, television relay, building inspection and alcohol counseling, among other services. With the exception of certain social services, these tribal government programs are delivered without regard to whether the recipient is Indian or non-Indian, and without regard to whether the land is in fee or trust status. Affidavits of Alice James, Appendix F, and Wilson Wells, Appendix G.

The Quinault Nation also manages Lake Quinault to provide recreational opportunities for Indians and non-Indians alike, consistent with the preservation and protection of the natural beauty and serenity of the Lake and its natural resources. To this end, the Quinault Nation currently authorizes and regulates boating activities on the Lake. Those regulations impose limitations on the speed and hours of operation of boats on the Lake. The purpose of these regulations is to enhance the attraction of the Lake and to protect visitors.

The tribe also regulates fishing on the Lake through the Quinault Fish and Game Commission with the assistance of tribal biologists and fishing staff. Except during conservation closures to protect certain salmon stocks, the Quinault Nation has authorized non-members to obtain a tribal fishing permit to fish on Lake Quinault. Tribal fishing permits have been available to tourists at the Amanda Park Mercantile operated by Plaintiff Snow. Amanda Park is a tourist community adjacent to Lake Quinault. As part of its fisheries program, the tribal government operates a salmon and steelhead pen rearing enhancement facility on Lake Quinault. The project regularly hires high school students from Amanda Park and surrounding areas. Project vehicles are fueled and serviced at businesses in Amanda Park, and the tribe maintains an account with Plaintiff Snow's Mercantile to purchase general items for the project. Official and unofficial visitors are attracted to the Lake Quinault area by the pen rearing facility itself. Efforts have been made by the Tribe to ensure that a high level of water quality is maintained in Lake Quin-

ault. The tribal government has engaged in discussions with federal authorities to provide for a sewer project along the Lake's south shore to replace existing drain fields and the tribe was instrumental in stopping the dumping of raw sewage into the Lake by a major resort on the South Shore. Affidavit of Oliver Mason, Tribal Vice-Chairman.

Funding for these services is derived from federal grants, tribal taxes, and appropriations from earnings of tribal government business enterprises. Federal funding is cumbersome, unreliable, and inflexible. Appropriations from tribal businesses for governmental programs has deprived these enterprises of the ability to expand at their potential rate and has made them more vulnerable to market fluctuations in the erratic wood and seafood markets.

The tribal government realizes the need to establish a reliable revenue base for the delivery of government services and to reduce dependence on unreliable federal funding. Such efforts must focus on commerce generated by the Reservation's resources. Property taxes imposed by many

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other governments are of limited value on the Reservation, since the United States owns most of the Reservation's land. Affidavit of Alice James.

Plaintiff Snow claims that he and other non-Indians receive no tribal government services and that services are provided to them by the county and state, by whom they are also taxed. The purpose of a motion for summary judgment is to pierce the allegations to the facts. The issue in this case is not whether Plaintiffs pay state taxes and receive state services. The record establishes that the Plaintiffs do business within the Quinault Reservation and that the tribal government provides services which are available and of benefit to Plaintiffs and others doing business within the Reservation's boundaries. Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444-46 (1940), rehearing denied, 312 U.S. 712 (1941).

The Supreme Court's recent decision in Washington v. Confederated Tribes of the Colville Indian Reservation, 100 S. Ct. 2069 (1980), makes it clear that Indian tribes have the power to impose the tax challenged in this case. "Federal Courts

also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." Id. at 2081. In reaching this conclusion, the Court specifically distinguished the holding of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Although Plaintiffs advance the argument that Oliphant should be expanded, the decision in Colville underscores the point that the holding in Oliphant is expressly limited to the issue of criminal jurisdiction. 435 U.S. at 196 n.7. As Colville shows, Indian tribes have retained jurisdiction in civil matters over both Indians and non-Indians within their reservations. See White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578 (1980); Merrion v. Jicarilla Apache Tribe, 617 F. 2d 537 (10th Cir. 1980); Shoshone and Arapahoe Tribes v. Knight, No. C79-267B (D. Wyo. June 27, 1980).

Plaintiffs argue that Colville must be read to recognize tribal civil jurisdiction only on Indian trust lands, not on fee patented lands. This argument must be rejected because the authorities relied upon by the Court in Colville themselves dealt with tribal civil jurisdiction, in

some cases taxing jurisdiction, on both fee and trust land. 100 S. Ct. at 2081.

Plaintiffs have argued that the tax in this case is discriminatory. The tribal forum for the adjudication of such claims is exclusive both for Indians and non-Indians. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Plaintiffs' reliance on Trans-Canada Enterprises, Ltd. v. Muchleshoot Indian Tribe, No. C77-882M (W.D. Wash. 1978), and Cardin v. DeLaCruz, No. C79-1184M (W.D. Wash. 1980), is not well placed. In each of these cases, the district court expanded the limited holding of Oliphant so as to preclude the exercise of tribal civil jurisdiction over non-Indians. In neither of those cases did the district court have the benefit of the Supreme Court's decision in Colville, which holds that Oliphant cannot be expanded to the issue of civil jurisdiction.

In view of the foregoing, Defendant's motion for summary judgment is granted.

Dated this 27th day of September, 1980.

/s/ Jack E. Tanner  
UNITED STATES DISTRICT JUDGE



Approved as to form:

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 709 F.2d 1319, and is reproduced as Appendix A hereto. The Findings of Fact, Conclusions of Law, and Order on Summary Judgment, entered by the District Court on September 29, 1980, are not reported, and are reproduced as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1983. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY,  
AND OTHER PROVISIONS INVOLVED

Involved are: (1) United States



## APPENDIX C

### UNITED STATES CONSTITUTION

AMENDMENT V - CAPITAL CRIMES;  
DOUBLE JEOPARDY;  
SELF-INCRIMINATION; DUE PROCESS;  
JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX D

### Indian Civil Rights Act

#### § 1301. Definitions

For purposes of this subchapter, the term --

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

#### § 1302. Constitutional rights.

No Indian tribe in exercising powers of self-government shall --

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their per-

sons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law: or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

APPENDIX E

24 Stat. 388

CHAP. 119. - An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon

in quantifies as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: Provided, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: And provided further, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservations,



shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: And provided further, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: Provided, That if any one entitled to an allotment shall fail to make a selection within four

years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Sec. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose



tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General

Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allocated, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made

touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time

to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the

same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied,

on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes [sic] in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments



shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and

no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choc-taws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act



contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

## APPENDIX F

### GENERAL ALLOTMENT ACT

25 U.S.C. 331 et seq.

§ 331. Allotments on reservations; irrigable and nonirrigable lands

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allot-

ments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: Provided further, That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein,

with the consent of the Indians expressed in such manner as the President in his discretion may require.

§ 332. Selection of allotments

All allotments set apart under the provisions of sections 331-334, 339, 341, 342, 348, 349 and 381 of this title shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: Provided, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the

Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

**§ 333. Making of allotments by agents**

The allotments provided for in sections 331-334, 339, 341, 342, 348, 349 and 381 of this title, shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the

Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the Bureau of Land Management.

**§ 334. Allotments to Indians not residing on reservations**

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in sections 331-334, 339, 341, 342, 348, 349 and 381 of this title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348



and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

**§ 335. Extension of provisions as to allotments**

Unless otherwise specifically provided, the provisions of sections 331-334, 339, 341, 342, 348, 349, and 381 of this title are extended to all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians.

**§ 336. Allotments to Indians making settlement**

Where any Indian entitled to allotment under existing laws shall make

settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in sections 348 and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general



laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

§ 337. Allotments in national forests

The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements in land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether

the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

**§ 337a. San Juan County, Utah; discontinuance of allotments**

No further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah.

**§ 338. Repealed. May 29, 1928, c. 901, § 1(64), 45 Stat. 991**

**§ 339. Tribes excepted from certain provisions**

The provision of sections 331-334, 341, 342, 348, 349, and 381 of this title shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska

adjoining the Sioux Nation on the south added by Executive order.

**§ 340. Extension of certain provisions**

The provisions of sections 331-334, 349, 341, 342, 348, 349, and 381 of this title, are declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Maimi tribe of Indians, located in the northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said sections, except and as otherwise on and after March 2, 1889, provided.

**§ 341. Power to grant rights-of-way not affected**

Nothing in sections 331-334, 339, 342, 348, 349, and 381 of this title shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making

just compensation.

**§ 342. Removal of Southern Utes to new reservation**

Nothing in sections 331-334, 339, 341, 348, 349, and 381 of this title, shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

**§ 343. Correction of errors in allotments and patents**

In all cases where it shall appear that a double allotment of land has been wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been made in the description of the land inserted in any patent, said Secretary is authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may

have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the Bureau of Land Management; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: And provided, That such lands shall not be open to settlement for sixty days after such cancellation: And further provided, That no conditional patent that has been or that may be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress.

**§ 344. Cancellation of allotment of unsuitable land**

If any Indian of a tribe whose surplus lands have been ceded or opened to

disposal has received an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

**§ 344a. Cancellation of patent issued to  
Indian allottee dying without  
heirs**

The Secretary of the Interior is authorized to investigate the allotment in the name of any deceased Indian and if it be shown to his satisfaction that the allottee died without heirs he shall report the facts to Congress with a recommendation for the cancellation of the patent issued in the name of such

Indian.

§ 345. Actions for allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of



any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

§ 346. Proceedings in actions for allotments

The plaintiff shall cause a copy of his petition filed under section 345 of this title, to be served upon the United States attorney in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the United States attorney upon whom service of petition is made as aforesaid to appear and defend



the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: Provided, That should the United States attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

§ 347. Limitations of actions for lands  
patented in severalty under  
treaties

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of

lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.

**§ 348. Patents to be held in trust;  
descent and partition**

Upon the approval of the allotments provided for in sections 331-334 of this title, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to

whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of

the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, sub-

ject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or

other organization was occupying on February 8, 1887, any of the public lands to which sections 331-334, 339, 341, 342, 348, 349, and 381 of this title are applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by the aforementioned sections, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of the said sections and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the



Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever, and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of sections 331-334, 339, 341, 342, 348, 349, and 381 of this title.

§ 348 a. Same; extension of trust period  
for Indians of Klamath River Reservation

The period of trust on lands allotted  
to Indians of the Klamath River Reser-



vation, California, which expired July 31, 1919, and the legal title to which is still in the United States, is hereby reimposed and extended for a period of twenty-five years from July 31, 1919: Provided, That further extension of the period of trust may be made by the President in his discretion, as provided by section 348 and section 391 of this title.

§ 349 Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or

her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of sections 331-334, 339, 341, 342, 349 and 381 of this title shall not extend to any Indians in the Indian Territory.

**§ 350. Surrender of patent, and selection of other land**

The Secretary of the Interior is authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under sections 331-334, 339, 341, 342, 348, 349 and 381 of this title, to permit any Indian to whom a patent has been issued for land on the reservation

to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: Provided, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of said sections.

§ 351. Patents with restrictions for lots in villages in Washington

The Secretary of the Interior is authorized, whenever in his opinion it shall be conducive to the best welfare and interest of the Indians living within any Indian village on any of the Indian reservations in the State of Washington, to issue a patent to each of said Indians for the village or town lot occupied by him, which patent shall contain restrictions against the alienation of the lot described therein to persons other than members of the tribe, except on approval of the Secretary of the Interior; and if any such Indian shall die subsequent to

June 25, 1910, and before receiving patent to the lot occupied by him, the lot to which such Indian would have been entitled if living shall be patented in his name and shall be disposed of as provided for in section 372 of this title.

**§ 352. Cancellation of trust patents within power or reservoir sites**

The Secretary of the Interior, after notice and hearing, is authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: Provided, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: Provided further, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the

area subject to irrigation by any such project.

**§ 352a. Cancellation of patents in fee simple for allotments held in trust**

The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

**§ 352b. Same; partial cancellation; issuance of new trust patents**

Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent

of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by sections 348 and 349 of this title, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: Provided, That this section and section 352a of this title shall not apply where any such lands have been sold

for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired.

§ 352c. Reimbursement of allottees or heirs for taxes paid on lands patented in fee before end of trust

The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees, or Indian heirs or Indian devisees of allottees, for all taxes paid, including penalties and interest, on so much of their allotted land as have been patented in fee prior to the expiration of the period of trust without application by or consent of the patentee: Provided, That if the Indian allottee, or his or her Indian heirs or Indian devisees, have by their own act accepted such patent, no reimbursement shall be made for taxes paid, including penalties and interest, subsequent to acceptance of the patent: Provided further, That the fact of such



acceptance shall be determined by the Secretary of the Interior.

In any case in which a claim against a State, county, or political subdivision thereof, for taxes collected upon such lands during the trust period has been reduced to judgment and such judgment remains unsatisfied in whole or in part, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes including penalties and interest paid thereon, and upon payment by the judgment debtor of the costs of the suit, to cause such judgment to be released: Provided further, That in any case, upon submission of adequate proof, the claims for taxes paid by or on behalf of the patentee or his Indian heirs or Indian devisees have been satisfied, in whole or in part, by the State, county, or political subdivision thereof, the Secretary of the Interior is authorized to reimburse the State, county, or political subdivision for such amounts as may have been paid by them.

**§ 353. Sections inapplicable to certain tribes**

The provisions of sections 337, 351, 352, 372, 373, 403, 406, 407, and 408 of this title shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma. Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.

**§ 354. Lands not liable for debts prior to final patent**

No lands acquired under the provisions of sections 331-334 of this title shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.

**§ 355. Laws applicable to lands of full-blooded members of Five Civilized Tribes**

The lands of full-blooded members of any of the Five Civilized Tribes are made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisal, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

**§ 356. Allowance of undisputed claims of restricted allottees of Five Civilized Tribes**

No undisputed claims to be paid from individual moneys of restricted allottees, or their heirs, or uncontested agricultural and mineral leases (excluding oil and gas leases) made by individual restricted Indian allottees, or their heirs, shall be forwarded to the

Secretary of the Interior for approval, but all such undisputed claims or uncontested leases (except oil and gas leases) shall be paid, approved, rejected, or disapproved by the Superintendent for the Five Civilized Tribes of Oklahoma: Provided, however, That any party aggrieved by any decision or order of the Superintendent for the Five Civilized Tribes of Oklahoma may appeal from the same to the Secretary of the Interior within thirty days from the date of said decision or order.

**§ 357. Condemnation of lands under laws of States**

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

**§ 358. Repeal of statutory provisions relating to survey, classification, and allotments which provide for repayment out of Indian moneys**

Any and all provisions contained in any Act passed prior to March 7, 1928,

for the survey, resurvey, classification, and allotment of lands in severalty under sections 331 and 334 of this title, which provide for the repayment of funds appropriated proportionately out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purposes, are hereby repealed: Provided further, That the repeal hereby authorized shall not affect any funds authorized to be reimbursed by any special Act of Congress wherein a particular or special fund is mentioned from which reimbursement shall be made.

## APPENDIX G

CHAP. 246.--An Act To Provide for allotments to certain members of the Hoh, Quileute, and Ozette tribes of Indians in the State of Washington.

Be it enacted by the Senate and house of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinalt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinalt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinalt Reservation rather than on the reservations set aside for these tribes: Provided, That the allotments authorized herein shall be made from the surplus lands on the Quinalt Reservation after the allotments to the Indians thereon have been completed.

Approved, March 4, 1911.

## APPENDIX H

### TREATY WITH THE QUINAIELT, ETC., 1855.

ARTICLE 1. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl [sic] Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE 2. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington,



to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE 3. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting,

gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine all stallions themselves.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States,

who may from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may hereafter, when in his opinion the interest of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them

with other friendly tribes or bands, in which later case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of the individuals.

ARTICLE 8. The said tribes and bands acknowledge their dependence on the

Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in case of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offender against the laws of the United States, but to deliver them to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their

reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said

central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals,



at Olympia, January 25, 1856, and on the  
Qui-nai-elt River, July 1, 1855.

Isaac I. Stevens, Governor and Sup't  
of Indian Affairs.

## APPENDIX I

### QUINAIELT RESERVE.

EXECUTIVE MANSION,  
November 4, 1873.

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, with the line of said survey, 5

miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinsaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

U. S. Grant

## APPENDIX J

### CONSTITUTION OF THE QUINULT INDIAN NATION

#### PREAMBLE

We, the Indians of the Quinault Indian Nation, in order to establish a better tribal organization; to preserve our land base, culture and identity; to safeguard our interest and general welfare; to secure the blessings of freedom [sic] and liberty for ourselves and for our posterity; and to amend our By Laws of August 22, 1922, as amended, do hereby approve and adopt this Constitution.

#### ARTICLE I - SOVEREIGNTY

SECTION 1 - SOVEREIGNTY: Notwithstanding the issuance of any patent, the jurisdiction and governmental power of the Quinault Nation shall extend to: (a) all lands, resources, and waters reserved to the Quinault Nation pursuant to the Treaty of Olympia, 12 Stat. 971, established by Executive Order dated November 4, 1873 (16 Stat. 923) [sic] and to all persons acting within the boundaries of those reserved lands or waters; (b) all usual and accustomed fishing grounds, open and unclaimed lands reserved for

hunting and gatherings and other lands necessary for the appropriate use of fishing and hunting grounds; and all members exercising tribal hunting, gathering and fighting [sic] rights on or off the Quinault Reservation in Quinaults usual and accustomed fighting [sic] grounds or: (c) all lands or waters held by the United States in trust or reserved by the Quinault Nation for the use and benefit of any member of the Quinault Tribe when such lands or waters are not within the boundaries of an established Indian Reservation; (d) all members of the Quinault Nation while such members are within the boundaries of the United States of America or any of its Reservations, states, territories, possessions, zones, or districts; except where such jurisdiction is expressly limited by the laws of the United States; (f) off-shore marine waters for a distance concurrent with the jurisdiction of the United States.

SECTION 2 - GENERAL WELFARE: It shall be the goal of the Quinault Nation to provide for the general safety and welfare of all persons acting by the right of membership in the Quinault

Nation or acting or residing within the jurisdiction of the Quinault Nation.

ARTICLE II - ENROLLMENT

SECTION 1 - MEMBER: (a) Any person of 1/4 Quinault, Queets, Quileute, Hoh, Chinook, Chehalis, or Cowlitz blood of one of the named Tribes or combined, not a member of any other federally recognized Indian tribe. (b) any person adopted into the Nation by a majority vote of the General Council, at a regular annual meeting of that council. The ownership of trust land on the Quinault Reservation shall be an important consideration in recommending adoption, but such ownership shall not be considered a necessary or sufficient qualification or condition for a recommendation of adoption.

SECTION 2 - ENROLLMENT COMMITTEE:  
(a) Membership. The enrollment committee shall consist of not less than four (4), nor more than nine (9) members of the Quinault Nation, appointed by the Business Committee. (b) Duties. The enrollment committee shall: (1) accept applications for enrollment and adoption, (2) investigate all applications for enrollment and adoption, (3) approve all appli-

cations for enrollment where applicants qualify for membership in the Quinault Nation under the provisions of this Constitution. A list of all persons approved for enrollment during the interim between annual General Council meetings shall be published and posted publicly in places determined to be appropriate to inform the general membership of pending enrollment thirty (30) days prior to the next annual General Council meeting and presented by the enrollment committee to the General Council at the next annual General Council meeting, (4) recommend to the General Council for their vote, persons approved by the enrollment committee for adoption into the Quinault Nation; a list of such persons shall be posted with the pending enrollment list, (5) participate in the interviewing and hiring of an enrollment clerk, (6) issue an official notice of denial of enrollment to any person, who, after all due investigation by the enrollment committee is found not to be qualified for enrollment in the Quinault Nation, (7) issue an official notice of denial of recommendation to any person, who, after all due



investigation by the enrollment committee is found not to be acceptable for a recommendation of adoption.

SECTION 3 - APPROVED APPLICANTS: All persons approved for enrollment by the enrollment committee shall be considered members for all purposes until their names are presented at an annual General Council meeting; provided, persons approved for enrollment shall not be permitted to vote on the enrollment or adoption of any person.

SECTION 4 - APPEALS: (a) Persons denied enrollment by a final act of the enrollment committee may appeal the decision of the enrollment committee to the General Council and if denied by the General Council may appeal to the Quinault Tribal Court. Persons denied enrollment may request a recommendation of adoption. (b) Persons denied a recommendation of adoption by a final act of the enrollment committee may request that the General Council adopt them at an annual meeting of the Council. The decision of the General Council shall be final.

SECTION 5 - OBJECTIONS TO ENROLL-

MENT: Any member may object to the enrollment of any person approved for enrollment at the time the name of that person approved for enrollment is presented to the General Council by the enrollment committee. The name of the member objecting shall be recorded and that objecting member shall have ninety (90) days to present sufficient evidence to cause reexamination of the enrollment application to the enrollment committee. During that ninety (90) day period and during any disenrollment investigation, the person objected to shall exercise the rights of a member. If the ninety (90) days shall pass without sufficient evidence being presented to the enrollment committee to cause the enrollment committee to reinvestigate the application, the person objected to shall be enrolled.

SECTION 6 - DISENROLLMENT: (a) The enrollment committee shall not begin review of the enrollment of a member without first notifying a person subject to a disenrollment investigation that he or she is subject to such an investigation and allowing such person to view all

evidence being used to question member status. (b) the enrollment committee in a disenrollment investigation shall follow all procedures set out herein for enrollment, including presentation of the names of any finally disenrolled person to the General Council at the next annual meeting of that Council. (c) exclusive grounds for disenrollment shall be that a person submitted fraudulent evidence in the application for enrollment in the Quinault Nation in order to qualify under the provisions of this Constitution, (d) adopted members shall not be subject to disenrollment proceedings, (e) persons finally disenrolled shall have the right to appeal their disenrollment to the Quinault Tribal Court.

### ARTICLE III - GENERAL COUNCIL

SECTION 1 - MEMBERSHIP IN THE GENERAL COUNCIL: All members, including adopted members of the Quinault Nation shall be members of the General Council.

SECTION 2 - VOTING: Members of the General Council age 18 years or more, who are present at the appointed time and place of elections shall be permitted to vote in General Council meetings.

SECTION 3 - MEETINGS: (a) The annual meeting of the General Council shall be held on the last Saturday in March at a place within the boundaries of the Quin-sault Reservation. (b) All meetings of the General Council shall be announced by the Business Committee by posting notices at Taholah, Queets, Amanda Park and any other place determined by the Business Committee at least ten (10) days in advance of the meeting and by publishing notice in a newspaper of general circulation in the vicinity of the Reservation. (c) Special meetings may be called by the Business Committee or by fifty (50) voting members by giving and posting the required notice. (d) The purpose of the General Council meetings shall be to elect or recall the members of the Business Committee and to declare the will of the General Council on issues placed before the General Council by the agenda and by persons raising issues at any meeting. (e) A quorum for conducting business at any meeting shall be fifty (50) voting members. (f) The agenda for the annual meeting shall be published by the Secretary of the Tribe. All items to

be placed on the agenda shall be submitted to the Secretary thirty (30) days in advance of the annual meeting. Items on the agenda shall be considered before issues or questions raised from the floor. (g) In addition to the annual meeting, quarterly General Council meetings may be held.

SECTION 4 - BILL OF RESERVED POWERS:

The following powers shall be reserved to the General Council and the Business Committee or other agency of the Nation shall be required to obtain the advise and consent of the General Council prior to taking any action with regard to these powers. Any action the Business Committee shall take with regard to these powers without obtaining the advice and consent of the General Council shall be void and have no legal effect. (a) The relinquishment of any National criminal or civil jurisdiction to any agency, public or private; provided that this section shall not prevent the Business Committee from commissioning non-National or non-Bureau of Indian Affairs peace officers to enforce National laws and regulations. (b) The termination of the

Quinault Reservation. (c) The adoption of person into the Nation. (d) The sale of hunting or fishing rights, grounds, or stations. (e) Any other act which jeopardizes any treaty right of the Quinault Nation; or is prohibited to the Business Committee by this Constitution, or by instruction of the General Council, without prior approval of the General Council.

#### ARTICLE IV - BUSINESS COMMITTEE

SECTION 1 - OFFICERS: The officers of the Nation shall consist of the President, the Vice-President, Secretary and Treasurer and seven (7) Councilmen. The said eleven (11) officers shall constitute the Business Committee of the Quinault Nation and all shall have the right to vote on issues brought before the Business Committee.

SECTION 2 - QUORUM: A quorum of the Business Committee shall consist of at least six (6) officers, including the President and Vice-President, and decisions shall be made by a majority vote of those present. In the absence of the President and Vice-President, no meeting shall be held unless an officer has been

duly appointed by the President or the Vice-President to chair the meeting.

SECTION 3 - ELECTION: The officers shall be elected at the annual meeting of the General Council and shall serve three year staggered terms. Nominations shall be made from the floor. Election shall be by secret ballot. No absentee ballots shall be allowed. Officers shall be elected one at a time. When during the course of any General Council meeting, any presently serving officer shall be elected to fill any other position on the Business Committee, the position vacated by the election shall be immediately filled by electing another qualified person to the remainder of the term of the vacated position.

SECTION 4 - QUALIFICATIONS: Any enrolled member who maintains permanent residence within the Reservation boundaries, is present at the election, and is entitled to vote in the General Council, shall be eligible to be elected as an officer of the Nation, provided that no more than one brother, sister, father, mother, husband, wife or child of any person already serving as an officer may



be elected as an officer. Officers moving their residence outside the boundaries of the Reservation during their term of office will be considered to have resigned from the Business Committee.

SECTION 5 - REMOVAL: (a) Any officer who is absent from three consecutive regular Business Committee meetings without an excuse acceptable to the Business Committee or who commits acts in violation of his position of trust as an officer of the Quinault Nation shall be removed from office. (b) Prior to removal pursuant to (a) above, the officer whose removal is contemplated shall be given a reasonable opportunity to answer charges and a written statement of the charges against him shall be made available to him fifteen (15) days prior to said meeting. (c) An officer who has been removed shall have the right within thirty (30) days to file an appeal to the General Council. In the event of such an appeal, the Business Committee shall promptly call a special meeting of the General Council, at which special meeting, it shall be decided whether the removed officer shall be permanently

removed. Failure to obtain a quorum of the General council at such a special meeting shall be considered affirmation of removal of any officer.

SECTION 6 - RECALL: Any officer may be removed for any reason by vote of the General Council on a recall petition, specifying the reasons for removal. A recall petition shall be signed by at least fifty (50) qualified voters, and filed with the Business Committee. Upon the filing of such a petition, the Business Committee shall promptly call a special meeting of the General Council. Written notice of the petition shall be given to the officer at least fifteen (15) days prior to the meeting, and he shall be entitled to state his case before the General Council. The decision of the General Council shall be final. Failure to obtain a quorum at such a General Council meeting shall require the dismissal of the recall petition and no new recall petition may be filed against the officer in question for a period of one year following said meeting.

SECTION 7 - VACANCIES: Vacancies on the Business Committee shall be filled no

more than sixty (60) days following the occurrence of a vacancy by a 2/3 vote of a quorum of the remaining officers; provided that such appointee is a voting member of the Nation and is otherwise qualified. The vacancy shall be filled by election at the next General Council meeting for the remainder of the existing term. No person not elected to the Business Committee by the General Council shall be appointed to the position of President or Vice-President.

SECTION 8 - MEETINGS: Regular open meetings of the Business Committee shall be held at least once in each month on a regular schedule set by the Business Committee. Special meetings may be called on a reasonable notice to all officers. Executive sessions of the Business Committee may be held on majority vote of the Committee. All regular meetings shall be held within the boundaries of the Quinault Reservation.

SECTION 9 - BY-LAWS: The Business Committee shall by ordinance adopt its own procedures and duties of officers, except as herein provided.

ARTICLE V - POWER AND RESPONSIBILITIES  
OF THE BUSINESS COMMITTEE

SECTION 1 - GENERAL: It shall be the duty of the Business Committee to govern all people, resources, lands, and waters under the jurisdiction of or reserved to the Quinault Nation in accordance with this Constitution, the Quinault Tribal Code of laws, the Quinault Treaty, the laws of the United States expressly limiting the powers of the Quinault Nation, and the instructions of the General Council. Any rights, powers and authority expressed, implied, or inherent vested in the Nation but not expressly referred to in this Constitution shall not be abridged by this Article, but shall be exercised by the Business Committee or the General Council by the adoption of appropriate ordinances and agreements.

SECTION 2 - LAWS: The Business Committee shall have the power to enact laws for the welfare of the Nation; provided, however, that such laws are not in conflict with this Constitution, and that public hearings be held on each such law prior to their adoption.

SECTION 3 - POWERS: The Business Committee shall have the power: (a) To enter into agreements on behalf of the Nation with federal, state, and local governments or agencies, and other public and/or private organizations or persons; provided, that these agreements are not in conflict with this Constitution, the instructions of the General Council, or the laws of the Quinault Nation. (b) To provide for the execution and enforcement of the laws of the Quinault Nation; and to establish an independent Tribal Court, and to provide by law for its jurisdiction, procedures, and appointment or election of its judges; and to charter and regulate associations, corporations for profit and not for profit, towns, special districts, schools, religious institutions, financial institutions and all other entities; and to establish National enterprizes as branches of the National government. (c) To levy and collect taxes on members and other persons or entities within the National jurisdiction; provided that no tax shall be levied on trust real property; further provided that no tax shall be levied

without holding public hearings convenient in time and place to all members of the Quinault Nation and those subject to its jurisdiction; to determine the need for, and effect of, such a tax. (d) To assert the defense of sovereign immunity in suits brought against the Nation and to waive the said defense by agreement where National realty or personalty not held in trust by the United States is pledged or when property held in trust by the United States is pledged with the consent of the United States. (e) To govern the sale, disposition, and lease of tribally owned assets, and to provide for the zoning and other land use regulation of all lands within the boundaries of the Reservation and the jurisdiction of the Quinault Nation; and for the purity, volume, and use of all water to which the Quinault Nation and the Quinault people are entitled; and for the purity of the air within the Quinault Reservation. (f) To manage, lease, permit, sell, or otherwise deal with tribally owned lands, tribally owned interests in lands, water rights, fishing stations, mineral rights, hunting

grounds, fish and wildlife resources; or other tribally owned assets, and to purchase or otherwise acquire lands or interests in lands within or without the Reservation, and to hold those lands in tribal or federal trust and to regulate allotted trust and non-trust lands within the Reservation boundaries insofar as such regulation is not prohibited by federal law and does not violate the rights of owners; provided, that tribally owned lands held in trust by the United States shall not be sold or encumbered unless authorized by the General Council. The authority to manage National lands and timber may be delegated to a special committee or committees. (g) To engage in any business that will further the economic well being of the Nation and of the members of the Nation, or undertake any program or projects designed for the economic advancement of the people or the Nation; and to regulate the conduct of all business activities within Reservation boundaries. (h) To borrow money from the federal government or other sources, to direct the use of such funds of productive purposes, and to pledge or



assign chattels or income due or to become due. (i) 1--To administer any funds within the control of the Nation in accordance with an approved National budget; to make expenditures from available funds for tribal purposes including salaries and expenses of tribal employees or officials, 2--The Business Committee shall prepare an annual Nation budget, 3--This budget shall include all normal operating expenses, any special projects or expenditures contemplated by the Nation, 4--All expenditures of tribal funds by the Business Committee shall be authorized by it or by the General Council in legal session and the amounts so expended shall be a matter of public record. 5--The Business committee shall have authority to approve amendments to the Nation's annual budget for special appropriations in any budget year. 6--The approved budget shall be posted at the National Business Office in Taholah, Queets, and the Post Office in Taholah. (j) To provide for an escheat in order that real and personal property of members who die intestate and without heirs shall revert to the Nation. (k) To

manage, protect and preserve the wildlife and natural resources of the Nation and to regulate hunting, fishing, including shell-fishing, and trapping within the jurisdiction of the Nation. This power may be delegated to a special committee or committees. (l) On petition by fifty (50) voting members of the Nation or on its own motion, the Business Committee shall, within a reasonable time, hold a general membership election by secret ballot on any issue. (m) All officers and employees of the Nation who have possession of tribal funds shall account for same periodically to the Business committee. All officers and employees handling National funds shall be bonded. There shall be an annual audit of all National funds handled by National officers or employees to be performed by the Bureau of Indian Affairs or Certified Public Accountants. (n) To condemn land or interest in lands for public purposes within the boundaries of the Reservation; provided that owners of the lands condemned shall be paid the fair market value of such lands and any timber or buildings thereon. (o) To exact all laws

which shall be necessary and proper for carrying into execution any power delegated to the Business Committee or delegated to any person or committee under the supervision of the Business Committee. (p) To govern the inheritance of real and personal property owned by members.

#### ARTICLE VI - RATIFICATION

This Constitution shall go into effect when ratified by two thirds (2/3) of all members eligible to vote, present and voting at a General Council meeting at which a debate and vote on this Constitution has been placed on the agenda. All enrolled members of the Quinault Nation shall be notified of such a General Council meeting at least thirty (30) days prior to such a meeting, and the notice provided shall make specific reference to the proposed ratification of this Constitution. Election of officers provisions shall not take effect until the annual meeting of the General Council following the adoption of this Constitution.

#### ARTICLE VII - AMENDMENT

SECTION 1: This Constitution may be

amended by a two thirds (2/3) vote of a quorum of the General council at an annual or special meeting, provided, however, that the notice of the meeting at which an amendment is proposed shall be given at least thirty (30) days before the meeting, and shall set forth the proposed amendment and an explanation thereof; and provided further that after discussion of the amendment at the meeting there shall be a recess of at least 30 minutes to enable the members to further discuss the amendment among themselves.

SECTION 2: The Business Committee shall call a meeting to consider a proposed amendment upon its own motion, or upon receipt of a petition signed by fifty (50) voting members or upon resolution of the General Council.

ARTICLE VIII - ENFORCEABILITY

The provisions of the Constitution shall be enforceable exclusively in the Quinault Tribal Court and in the Federal Courts of the United States where provided by federal law, and shall not be enforceable in any other Court, except where the Quinault Tribe brings suit in

its own name in any other court. This section shall not be interpreted as a consent to suit or waiver of sovereign immunity by the Quinault Indian Nation.

ARTICLE IX - APPROVAL OF SECRETARY  
OF INTERIOR

The Secretary of the Interior shall have the power to review actions taken pursuant to the herein named powers and all other National powers, but only in those cases and only to the extent that the Secretary has been given such powers of review by express statutory command of the Congress of the United States.

ADOPTED MARCH 22, 1975.

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## APPENDIX K

### TITLE 40

#### BUSINESS LICENSE ORDINANCE

AN ORDINANCE, relating to and providing for a license for occupations, pursuits, and privileges; defining offenses and prescribing penalties.

40.01. Exercise of Revenue License Power. The provisions of this ordinance shall be deemed an exercise of the power of the Business Committee of the Quinault Tribal Council to license for revenue.

40.02. Definitions. In construing the provisions of this ordinance, save when otherwise declared or clearly apparent from the context, the following definitions shall be applied:

(a) The term "tax year" or "taxable year" shall mean either the calendar year or the taxpayer's fiscal year when permission is obtained from the Business Committee to use a fiscal year in lieu of the calendar year.

(b) The word "person" or "company" herein used interchangeably means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company,



joint-stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, non-profit, or otherwise, and includes any instrumentality thereof, provided a valid tax may be levied upon or collected therefrom under the provisions of this Ordinance.

(c) The word "Business" includes all activities engaged in with the object of gain, benefit or advantage to the taxpayer or another person or class, directly or indirectly.

(d) The term "Business Committee" is a representative body of the Quinault Tribe whose duties are to represent the Indians of the Reservation in all matters pertaining to the tribe and in all Tribal matters, arising between the sessions of the council, to follow the instructions of the council and render any aid they can to any individual member of the tribe needing assistance; to make a full report of their work to each succeeding council and in general to perform all of the duties of an executive committee between meetings of the council.

(e) The term "engaging in

business" means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

(f) The word "successor" means any person who shall, through direct or indirect means or conveyance, purchase or succeed to the business, or portion thereof, or any part of the stock of goods, wares or merchandise or fixtures or any interest therein of a taxpayer quitting, selling out, exchanging, or otherwise disposing of his business. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor. (sic)

(g) The word "taxpayer" includes any individual, group of individuals, corporation or association required to have a Business License hereunder, or liable for any license fee or tax, or for the collection of any license fee or tax hereunder, or who engages in any business, or who performs any act, for which a license fee

or tax is required by this Ordinance.

(h) Words in the singular number shall include the plural, and the plural shall include the singular. Words in one gender shall include all other genders.

(i) The word "Secretary" shall mean the Secretary of the Quinault Tribal Council.

(j) The word "Treasurer" shall mean the Treasurer of the Quinault Tribal Council.

(k) The word "Council" shall mean the Quinault Tribe.

40.03. Companies To Hire Indian Labor. Where and whenever possible Indian labor shall be hired by companies operating by license within the Quinault reservation. In cases of fish and clam buying companies with receiving stations within the reservation, such as fish houses and trucks buying clams off the reservation beaches, all Indian labor is required. A white man married to an Indian woman does not take precedence over that of an Indian as to employment, and said Indian is required to be a bona fide resident of Taholah. [This is a very old tribal ruling.]

40.04. Business Licenses Required by

Both Non-Indian and Indian Alike. It is hereby duly enacted in this Ordinance that both Non-Indians and Indians alike, regardless of degree of Indian blood, are required to secure a reservation business license, and both Non-Indians' and Indians' license fees shall be equal.

40.05. Business License Required. On or after the 24th day of July, 1961, if this ordinance is then in effect, otherwise on and after the effective date of this Ordinance, no person, whether subject to the payment of a tax or not, shall engage in any business or activity in the Quinault Indian Reservation for which a license fee or tax is imposed by this Ordinance without having first obtained and being a holder of a valid and subsisting license so to do, to be known as a "Business License" issued under the provisions of this Ordinance as hereinafter provided, and without paying the license fee or tax imposed by this Ordinance, and in addition the sum of \$5.00, as a license fee which shall accompany the application for the license. Such license shall expire at the end of the calendar year in which it is issued, and a new license shall be required for each

calendar year. Applications for the license shall be made to and issued by the Business Committee on forms provided by them.

40.06. Bond Required. The usual procedure in the course of business in applying for a Business License a bond is hereby required, forms for such bonds may be obtained from the Treasurer, Quinault Tribal Council. (sic)

40.07. Payment of License Fees. The license fee or tax payable hereunder shall at the time the return is required to be filed hereunder be paid to the Quinault Tribal Treasurer by bank draft, certified check, cashier's check, personal check or money order, or in cash. If payment is made by draft or check, the tax or fee shall not be deemed paid unless the check or draft is honored in the usual course of business; nor shall the acceptance of any sum by the Treasurer be an acquittance or discharge of the tax or fee due unless the amount of the payment is in full and actual amount due. The return shall first be presented to the Tribal Treasurer, who shall endorse thereon the date and amount of the payment received by him and return

the same to the taxpayer who shall there-upon forthwith file the return with the Treasurer.

The Secretary is authorized, but not required to mail to taxpayers forms for applications for license and forms for returns, but failure of the taxpayer to receive any such forms shall not excuse the taxpayer from making application for and securing the license required, making returns, and payment of the license fee or tax, when and or due hereunder. (sic)

40.08. Applications and Returns Confidential. The applications and returns made to the Business Committee pursuant to this Ordinance shall not be made public, nor shall they be subject to the inspection of any person except the President, Secretary, Treasurer, and the members of the Business Committee; and it shall be unlawful for any person to make public or to inform any other person as to the contents or any information contained in or to permit inspection of any application or return except as in this section authorized.

40.09. Business Committee to Make Rules. The Business Committee shall have

the power, and it shall be their duty, from time to time, to adopt, publish, and enforce rules and regulations not inconsistent with this Ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with any such rule or regulation.

40.10. Revocation of License. The Business Committee may revoke the license issued to any taxpayer who is in default in any payment of any license fee or tax hereunder, or who shall fail to comply with any of the provisions of this Ordinance. Notice of such revocation shall be mailed to the taxpayer by the Secretary, and on and after the date thereof any such taxpayer who continues to engage in business shall be deemed to be operating without a license and shall be subject to any or all penalties herein provided.

40.11. Penalties. Any person violating or failing to comply with any of the provisions of this Ordinance or any lawful rule or regulations adopted by the Business Committee pursuant thereto, if a non-Indian, upon conviction thereof, shall be punished by eviction from the reservation



premises and his Business License revoked permanently, depending upon the circumstances, or said license revoked temporarily to the discretion of the Business Committee.

Any taxpayer who engages in or carries on, any business subject to a tax hereunder without having his Business License so to do shall be guilty of a violation of this Ordinance for each day during which the business is so engaged in, or carried on; and any taxpayer who fails or refuses to pay the license fee or tax, or any part thereof, on or before due date, shall be deemed to be operating without having his license so to do.

Fishbuyers possessing a Quinault Reservation Business License buying salmon for commercial purposes from the reservation streams following the closure of the tribe's commercial seasons, said Business License shall be revoked by the Business Committee. The same shall apply to razor clams taken from the reservation clam beds. (sic)

40.12. This Ordinance shall take effect and be in force from and after this passage and legal publication.

Originally enacted by the Business Committee on  
July 24, 1961.

Horton Capoeman, President  
Frederick Saux, Secretary

## APPENDIX L

### RESOLUTION NO. 77 - 55 of the QUINAULT BUSINESS COMMITTEE

WHEREAS, the Quinault Business Committee is the governing body of the Quinault Indian Nation; and

WHEREAS, the Quinault Business Committee approved for public hearings on May 9, 1977, the draft of Rules Under Quinault Tribal Code, Title 40, Business License Ordinance; and

WHEREAS, three public hearings were held as follows: Queets, Washington, May 24, 1977; Taholah, Washington, May 25, 1977; and Amanda Park, Washington, May 26, 1977; after having been duly announced and advertised for the public's information, although not required by law; and

WHEREAS, all comments received have been reviewed and given consideration in regard to amending the draft of the proposed rules; now therefore be it

RESOLVED, that "Rules Under Quinault Tribal Code, Title 40, Business License Ordinance," as amended, are hereby adopted pursuant to Quinault Tribal Code § 40.09, and that Resolution No. 77-47 of the Quinault Business Committee is hereby superceded and repealed; now futhermore be it

RESOLVED, that the rules hereby adopted become effective August 1,

1977, and that any tax arising there-  
under becomes due and payable August  
15, 1977.

/s/ Joseph B. De La Cruz  
Joseph B. DeLaCruz  
Chairman  
Quinault Business Committee

C E R T I F I C A T I O N

As secretary of the Quinault Business  
Committee, I hereby certify that the  
foregoing resolution was duly enacted by  
the Quinault Business Committee at Taholah,  
Washington, on the 25th day of July, 1977,  
and was adopted by a vote of 3 FOR and 2  
AGAINST, at which time a quorum was present  
and voting.

/s/ Pearl L. Baller  
Pearl L. Baller  
Secretary  
Quinault Business Committee

RULES UNDER QUINULT TRIBAL CODE, TITLE 40,  
BUSINESS LICENSE ORDINANCE ADOPTED PURSUANT  
TO Q.T.C. 40.09; EFFECTIVE JULY 1, 1977

RULE 1.40 DEFINITIONS

For the purpose of this title, and unless otherwise required by the context:

(1) The term "commercial or industrial use" means the following uses of products, including by-products, by the extractor or manufacturer thereof:

- (a) any use as a consumer; and
- (b) the manufacturing of articles, substances, or commodities.

(2) The term "employee" means any person who carries out duties within this reservation under the direction and control of the taxpayer in return for remuneration in any form. The term does not include persons engaging in an independent trade or profession performing services for hire.

(3) The term "extractor" means every person who from his own land or from the land of another, either directly or by contracting with others for the necessary labor or mechanical services, for sale or

for commercial or industrial use, mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral or other natural resource product, or fells, cuts or takes timber, Christmas trees or other natural products, or takes, cultivates, or raises fish, shellfish, or other sea or inland water foods or products. It does not include persons performing under contract the necessary labor or mechanical services for others.

(4) The term "manufacturer" means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use, from his own materials or ingredients any articles, substances or commodities.

(5) The term "to manufacture" means all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof, a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use.

(6) The term "sale" means any trans-

fer of the ownership of, title to, or possession of property for a valuable consideration. It includes renting or leasing, conditional sales contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

(7) The term "sale at wholesale" means any sale of tangible personal property for resale or for processing or manufacturing for resale, and means any charge made for labor and services rendered by a subcontractor in respect to real or personal property for sale at retail or a prime contractor.

(8) The term "sale at retail" means any sale of tangible personal property for use or consumption and not for resale in any form as tangible personal property.

(9) The term "public utility" means every person engaging in:

(a) carrying on a telephone or telegraph business for hire;



(b) carrying on the business of operating a plant or system for the distribution of water for hire or sale;

(c) carrying on the business of operating a plant or system for the generation, production, or distribution of electrical energy for hire or sale;

(d) carrying on the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural.

The term shall include both publicly owned utilities and investor owned utilities.

#### RULE 2.40 TAX RATES

(1) Tax Upon Extractors. Upon every person engaging within this reservation in business as an extractor as enumerated below; as to such persons the amount of the tax with respect to such business shall be as specified, and if two or more employees are employed with respect to such business, the amount of tax specified shall be multiplied by the number of employees:

(a) Harvesting green timber;  
fifty dollars;

(b) Cedar Salvage Operation;  
twenty-five dollars;

(c) All others; twenty-five dollars.

Exemptions. The tax rate hereby levied shall not apply to the following extractors:

(a) Any person taking fish or shellfish pursuant to a valid tribal permit issued for the taxable year;

(b) Any owner of land held in trust by the United States taking a natural resource from such land during the time it is held in trust for him or her.

(2) Tax Upon Manufacturers. Upon every person engaging within this reservation in business as a manufacturer not specifically enumerated in these rules; as to such persons the amount of the tax with respect to such business shall be twenty-five dollars, and if two or more employees are employed with respect to such business the amount of the tax shall be twenty-five dollars multiplied by the number of employees.

(3) Tax Upon Public Utilities. Upon every person engaging within this reservation in business as a public utility; as to such persons the amount of the tax with respect to such business shall be five hundred dollars.

(4) Tax On Wholesalers. Upon every person engaging within this reservation in the business of making sales at wholesale not specifically enumerated in these rules; as to such persons the amount of the tax with respect to such business shall be twenty-five dollars and if two or more employees are employed with respect to such business the amount of the tax shall be twenty-five dollars multiplied by the number of employees.

(5) Tax On Retailers. Upon every person engaging within this reservation in the business of making sales at retail as enumerated below; as to such persons the amount of the tax with respect to such business shall be as specified, and if two or more employees are employed with respect to such businesses the amount of the tax specified shall be multiplied by the number of employees:

(a) Any business making sales at retail of tangible personal property for use or consumption including but not limited to appliance stores, clothing stores, sporting goods stores, and dealers in automobile trucks, boats, trailers, campers, mobile homes, heating systems and

fuels, heavy equipment, machinery of all kinds and construction, logging, mining, fishing, electrical and plumbing, materials, equipment, tools and supplies; fifty dollars;

(b) Abstract title insurance and escrow businesses; one hundred dollars;

(c) Amusement and recreation businesses including but not limited to golf, billiards, pool, pinball and other coin operated game machines, bowling, skating, operation of charter boats for sport fishing, river and fishing guides, and private fishing operations; twenty-five dollars;

(d) Automobile parking and storage garage businesses; fifty dollars;

(e) Automobile towing; fifty dollars;

(f) Contractors and subcontractors extracting for hire;

(1) Harvesting green timber; fifty dollars;

(2) Cedar Salvage Operation; twenty-five dollars;

(3) All Others; twenty-five dollars;

(g) Contractors and subcontractors

tors manufacturing for hire; twenty-five dollars;

(h) Contractors and subcontractors (excluding those specifically named in these rules) including but not limited to building construction, road and bridge construction, plumbing, well drilling, sewage system, electrical, heavy equipment, earth moving and transporting goods for hire; twenty-five dollars;

(i) Cleaning, fumigating, razing or moving existing structures; fifty dollars;

(j) Coin operated vending machine operators; fifty dollars;

(k) Credit Bureau businesses; one hundred dollars;

(l) Furnishing of lodging and all other services by a resort, hotel, rooming house, tourist court, motel, trailer camp, campground, and the granting of any similar license to use real property for periods of less than thirty days; one hundred dollars;

(m) Freezer locker rental or lease; twenty-five dollars;

(n) Gasoline service stations; twenty-five dollars;

(o) Gas, diesel and oil floats servicing boats; fifty dollars;

(p) Mobile fuel and oil trucks servicing logging and salvage operations; fifty dollars;

(q) Laundromats, laundry and dry cleaners; twenty-five dollars;

(r) Liquor stores; two hundred dollars;

(s) Printers and publishers; twenty-five dollars;

(t) Repairing, cleaning, and installing of tangible personal property including but not limited to auto and truck repair garages, machine repair shops, and septic tank pumpers, appliance repair shops; twenty-five dollars;

(u) Restaurants; twenty-five dollars;

(v) Traveling salespersons; twenty-five dollars;

(w) Taverns and nightclubs; two hundred dollars;

(x) Renting or leasing of tangible personal property for use or consumption within this reservation including but not limited to the services of airplane crop dusting and helicopter

lifting; fifty dollars;

(y) Warehouse and cold storage operators, cold deck storage of logs, log sorting yards, and all other storage of products, goods, or fuels, whether for sale or distribution without sale; fifty dollars;

(6) Tax On Service and Other Business Activities. Upon every person engaging within this reservation in the business of service and other business activities as enumerated below; as to such persons the amount of the tax with respect to such business shall be as specified and if two or more employees are employed with respect to such business the amount of the tax specified shall be multiplied by the number of employees:

(a) Accountants; one hundred dollars;

(b) Aerial surveyors and map makers; one hundred dollars;

(c) Agents (excluding those named below); one hundred dollars;

(d) Ambulances (excluding volunteer services); one hundred dollars;

(e) Appraisers (excluding those named below); one hundred dollars;



(f) Architects; one hundred dollars;

(g) Assayers; one hundred dollars;

(h) Attorneys; one hundred dollars;

(i) Barbers; twenty-five dollars;

(j) Bail Bond Agencies; one hundred dollars;

(k) Beauty Shop Owners; twenty-five dollars;

(l) Bail or Debt Collection Agencies; three hundred dollars;

(m) Brokers (excluding those named below); one hundred dollars;

(n) Chiropractors; one hundred dollars;

(o) Community Television Antenna Owners; two hundred dollars;

(p) Court Reporters; fifty dollars;

(q) Dentists; one hundred dollars;

(r) Detectives; one hundred dollars;

(s) Employment Agents; fifty dollars;

(t) Engineers; one hundred dollars;

(u) Foresters; one hundred dollars;

(v) Funeral Directors; one hundred dollars;

(w) Garbage Collectors; fifty dollars;

(x) Insurance Agents and Brokers and Bond Agents; one hundred dollars;

(y) Insurance Adjustors; one hundred dollars;

(z) Janitors; twenty-five dollars;

(aa) Kennel Operators; fifty dollars;

(bb) Landscape Surveyors; one hundred dollars;

(cc) Land Architects; one hundred dollars;

(dd) Loan Agents; one hundred dollars;

(ee) Log and Lumber Sealers; one hundred dollars;

(ff) Physicians; one hundred dollars;

(gg) Real Estate Agents, Brokers, and Appraisers; three hundred dollars;

(hh) Stenographers; fifty dollars;

(ii) Timber cruisers; one hundred dollars;

(jj) Undertakers; one hundred dollars;

(kk) Veterinarians; one hundred dollars;

(ll) Rental or Lease of real property for 30 days or more; one hundred dollars;

(mm) All Others; twenty-five dollars;

(7) Deductions Enumerated. In computing tax measured by the base rate multiplied by two or more employees, there may be a deduction from the base rate as follows:

(a) The base rate may be reduced by one-half in computing tax measured by any employee who is at the time of employment an enrolled member of an Indian tribe;

(b) The following method may be used as an illustration:

\$50.00 base rate

10 total employees

8 enrolled members of Indian tribes

\$25.00 (1/2 base rate) X 8 = \$200.00

\$50.00 base rate X 2 = \$100.00

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\$300.00 TOTAL  
TAX DUE

In the case of a public utility tax there may be deducted from the amount of the tax five percent for each employee who is at the time of employment an enrolled member of an Indian tribe, provided that the allowable deductions shall not exceed fifty percent of the amount of the tax.

(8) Exemptions. This title and the rules thereunder shall not apply to churches, schools, fraternal benefit societies, and bona fide non-profit organizations of a social, recreational, charitable, religious, educational or legal aid nature.

## GENERAL ADMINISTRATION PROVISIONS

### Rule 3.40

(1) Method to Determine Number of Employees. For the purpose of computing tax, the number of employees shall be the number of employees employed during one month of normal business operation. In the case of a seasonal business, the term "normal business operation" shall exclude any slow, peak, or off month.

(2) Time and Place of Sale.

(a) For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this reservation when the goods sold are delivered to the buyer in this reservation, irrespective of whether title to the goods passes to the buyer at a point within or without this reservation.

(b) With respect to the charge made for performing services a sale takes place in this reservation when the services are performed herein.

(c) With respect to the charge made for leasing or renting tangible personal property, a sale takes place in this reservation when the property is used in this reservation by the lessee.

(3) Authorization To Issue Business Licenses and Collect Fees & Taxes.

The Clerk of the Quinault Department of Revenue is authorized to issue Business Licenses pursuant to Title 40 and these rules; and is authorized to collect the filing fees and taxes due hereunder.

(4) Revenues to be Deposited in the Quinault Tribal Revenue Fund.

The Clerk of the Quinault Department of Revenue, upon receipt of any payments of tax, penalty, interest, or fees collected hereunder shall deposit them to the credit of the Quinault Tribal Revenue Fund or such other fund as may be provided by law. A Quarterly report of the amount deposited to the Revenue Fund shall be made to the Business Committee.

(5) Tax-When Due.

All taxes imposed for the privilege of engaging in business under this title shall be due and payable prior to the commencement of the taxable business activity and the renewal tax shall be due and payable on or before January fifteenth (15th) of each succeeding year.

(6) Assessment of Tax by the Department of Revenue.

As to each person engaging in business, or making application to do business,

the Department of Revenue shall determine the tax from facts and information obtained from such persons and other reliable sources.

As soon as the Department of Revenue procures such facts and information as it is able to obtain on which to base the assessment of any tax payable by such person, it shall proceed to determine and assess against such person the tax due.

(7) Deficient and Delinquent Payments.

If upon examination of any returns or from other information obtained by the Department of Revenue it appears that a tax or penalty has been paid less than that properly due, the Department of Revenue shall assess against the taxpayer such additional amount found to be due. The Department of Revenue shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within twenty days from the date of notice, or within such further time as the Department may provide.

No assessment or correction of an assessment for additional taxes due may be made by the Department more than one



year after the close of the tax year, except (1) against a taxpayer who has not obtained a Business License as required by this title, (2) upon a showing of fraud or of misrepresentation of a material fact by a taxpayer, or (3) where a taxpayer has executed a written waiver of such a limitation.

(8) Petition for Reduction of Tax after Payment.

Any person, having paid any tax, or corrected assessment of any tax, may apply to the Department within one hundred and eighty (180) days after the close of the tax year, or from the date of notice of the additional amount of tax, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition shall be set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The Department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith; if a conference is granted, the Department shall notify the

petitioner by mail of the time and place fixed therefor. After the hearing, the Department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner.

(8) Every person engaging in more than one taxable business activity shall be taxed under the applicable rates with respect to each such business.

Office - Supreme Court, U.  
**FILED**  
**DEC 5 1983**  
ALEXANDER L. STEVAS  
CLERK

NO. 83-595

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

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KENNETH R. SNOW, et al.,  
Petitioners,

v.

QUINAULT INDIAN NATION, et al.,  
Respondents.

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BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

MICHAEL P. O'CONNELL  
OFFICE OF RESERVATION ATTORNEY  
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1. Does the Quinault Indian Nation have jurisdiction to tax Indian and non-Indian operated businesses on reservation fee and trust land which do business with the Tribe and its members which intentionally engage in forestry and tourism related businesses thereby benefiting from tribal government programs encouraging and enhancing those businesses?

2. Does the Indian Civil Rights Act prohibit the Quinault Indian Nation from offering a tax credit to any businesses employing Indians on the Reservation?

3. May Petitioners raise Fifth Amendment delegation of federal power questions that do not present substantial federal questions?

4. Should the Court consider a challenge to taxes which have never been

assessed by the Tribe and never paid by  
Petitioners?

5. Should the court consider challenges to tribal taxes that were never presented to available tribal administrative or judicial fora?

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No. 83-595

IN THE  
SUPREME COURT OF THE UNITED STATES

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KENNETH R. SNOW, ET AL.,

PETITIONERS,

v.

QUINAULT INDIAN NATION, ET AL.,

RESPONDENTS

---

Respondents' Brief in Opposition

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Opinion Below

The opinion of the Court of  
Appeals is reported at 709 F.2d 1319.

I

Statement of the Case

A. Proceedings Below

Petitioners commenced an action in  
District Court for declaratory and in-  
junctive relief and "extensive damages"

before the Quinault Nation's business tax became effective on August 1, 1977. CR1; CR15D.1/ More than three years later, the case was submitted to the District Court on cross-motions for summary judgment. The District Court rejected Petitioners' claim that Indian Tribes have no jurisdiction to tax and that those Petitioners who do business on fee land are necessarily immune from

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1/ Among the parties not mentioned in Petitioners' Br., at i, are the following Plaintiffs-Appellants below: Ralph I. Thomas, See App. A; June Hopkins; Joseph L. Howard; Juanita Olson, d/b/a Amanda Park Tavern; C. Lawrence Chapman; Ernie Holmberg, d/b/a Holmberg Cedar Products, Inc.; William J. and Irene E. O'Connor Enterprises; Mary E. Highland, d/b/a The Cedars; Jean Brown, Secretary for Rain Forest Timber Products, Inc.; Albena Anderson, d/b/a Pacific Logging; Melvin Camas, d/b/a Camas Tire Shop; Leo Warren; d/b/a Wholesalers, Unltd.; William Richter, d/b/a Bill's Fixit Shop; Darrell Spoon, d/b/a Spoon's Automotive Parts, Inc.; Marjorie Dahinden; Dean S. Hopkins. CR99.

tribal taxes. Further, based on decisions of this Court, and the affidavits of the parties, the District Court determined that there was no genuine dispute as to any material issue. Based on substantial services provided by the Quinault Nation benefiting Petitioners' Reservation businesses, and there being no genuine dispute as to any material issue, the District Court granted summary judgment to Respondents. CR101, Pet. A15-24. Petitioners then moved for reconsideration, CR102. During the nearly three months when this motion was pending, CR108, Petitioners did not submit any additional affidavits to establish the existence of a genuine dispute, nor did they represent that they needed more time to gather additional evidence. Rule 56(f). The motion for reconsideration was then denied.

After briefing and argument in the Court of Appeals, submission was withdrawn pending disposition of Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir.), cert. denied, 103 S.Ct. 293 (1981) (upholding enforcement of Quinault building, safety and health codes). Upon reinstatement of the case, and applying the decisions of this Court, the Court of Appeals affirmed.

## II .

### Statement of the Facts

#### A. The Quinault Reservation

The Quinault Reservation is isolated and heavily forested, located on the Olympic Peninsula's Coast. Reserved pursuant to the Treaty, 12 Stat. 971 (1855), from the aboriginal territory of the Quinault Indians, the Reservation's 200,000 acres includes Lake Quinault, the Quinault River, and other waters historically used and



regulated for their fishing resources.  
United States v. Mitchell, 103 S.Ct.  
2961, 2963-2964 (1983); Hoh Tribe v.  
Washington, 522 F.Supp. 683 (W.D. Wash.  
1981); Mason v. Sams, 5 F.2d 255 (W.D.  
Wash. 1925). The Quinault Indian  
Nation is organized under a written  
constitution adopted in 1922. CR15,  
App. A.

Approximately two-thirds of the  
Reservation population is Indian.

Appellees' Ct. Appeals Br., App. C.

Many, possibly most, of the non-Indians

on the Reservation are married to

Quinaults, work for the Tribe or the

United States Indian Service or for the

entities which do businesses with the

Tribe or its members. Petitioners concede

they do business with tribal members.

Pet. at 6. 2/

B. Facts and Services Supporting Tribal Tax

Petitioners attempt to portray themselves as an economically insulated enclave of non-Indians residing and doing business in Amanda Park with no significant contact with the Tribe or its members. Petitioners emphatically ignore their own Complaint which identifies George Bertrand, an enrolled Quinault, as one of the businessmen residing in Amanda Park challenging the tribal tax. Para. 3.1, CRL. Plaintiff-Petitioner Erickson, by contrast, is a Seattle attorney who challenges the tax on

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2/ Petitioners attempt to qualify this jurisdictionally significant fact by stating their business with Indians is only "incidental." This attempted qualification, mere ipse dixit from Petitioners' counsel, is not supported by any affidavit as required by FRCP 56. Facts properly proved by Respondents show that Petitioners do substantial business with the Tribe and benefit substantially from services rendered by the Tribe.

attorneys practicing law in the Quinault Tribal Court. He represented Petitioner Rasmussen in a suit in Tribal Court over sewage entering the Quinault River from Rasmussen's Trailer Court, Quinault Indian Nation v. Rasmussen, which resulted in a voluntary settlement.

Petitioner Thomas also practices law in Tribal Court. See App. A. The uncontroverted record establishes that Petitioner Snow sells Quinault tribal fishing permits to enhance his business trade.

CR 96. Petitioner Sansom likewise sells outboard motors and fishing tackle.

CR 30 at 2. The Quinault Nation maintains an account at Snow's store to purchase hardware and other items used by the Tribe at its Lake Quinault-Amanda Park fish hatchery. Tribal fishery vehicles are fueled and serviced at Petitioners' businesses. Students from Amanda Park are regularly hired by the

Tribe to work at the Tribe's Amanda Park-Lake Quinault fish hatchery. The Quinault Nation has helped ensure moreover that a high level of water quality is maintained in Lake Quinault by stopping dumping of raw sewage into the Lake by a major resort and by assisting federal authorities in placement of a sewage system to replace defective septic systems along the lake-shore. Amanda Park is on the shores of Lake Quinault. The Tribe manages Lake Quinault's recreational fishery through its Fish and Game Commission, tribal biologists and other staff, and plants fish in the Lake from its fish hatchery. Tribal enforcement officers also ensure compliance with tribal fishing and boating regulations. Aff. of Mason, CR 96. Thus, the Tribe is involved in comprehensive management, regulation and enhancement of boating, fishing, swimming and water

quality on Lake Quinault, as well as doing business locally and being a local employer. Protection of water quality in Lake Quinault protects the domestic health of local residents and business people and makes the Lake attractive to and safe for tourists. This directly benefits local tourism oriented businesses which would be directly and adversely affected if the Tribe did not permit or did not manage and regulate Lake Quinault to promote and protect tourism and related businesses.

Most of the Reservation's lands are valuable primarily for their timber resources, approximately two-thirds of which are held in trust. CR 64. The Quinault Department of Natural Resources provides various resource protection services in reservation forest lands, both fee and trust. Department staff maintain a forest fire watch, are trained

in forest fire fighting, maintain forest fire equipment, and fight fires on fee and trust land. The Department exercises regulatory control over logging activities that can damage fish streams, timber resources, and the future productivity of forest lands. The Quinault Nation plants fish to replace runs of fish damaged by logging activities.

United States v. Washington, 384 F.Supp. 312, 375 (W.D. Wash. 1974). Approximately 800 miles of forest roads are maintained by the Tribe and its members providing access to much of the Reservation's forest interior. The vast majority of economic activity within the Reservation consists of logging, salvaging and milling of cedar shakes and shingles. CR 64. Emergency health care and emergency transport services provided by the Tribe and utilized by Indians and non-Indians are especially important to

people injured in dangerous forestry work on the Reservation. CR 44, App. D. Tribal police conduct timber theft patrols throughout the Reservation, the value of which is noted in a letter from ITT Rayioner. CR 66. These patrols benefit owners of fee and trust land and all those engaged in the forest products business by providing visible law enforcement. Tribal officers arrest Indian violators and can detain non-Indians suspected of crimes and turn them over to appropriate federal and state authorities for prosecution. Ortiz Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); State v. Burrola, 669 P.2d 641 (Ariz. App. 1983); State v. Ryder, 648 P.2d 774 (N.M. 1982). These services directly benefit Petitioners and others who are engaged in the Reservation forest products business, e.g., Ernie Holmberg, d/b/a Holmberg Cedar Products;



Jean Brown of Rain Forest Timber Products, Inc.; Cathy Stajar, Pacific Logging; ITT Rayonier, Inc., CR 55; Mayr Brother Logging Co., CR 77-78. 3/ These tribal government services likewise benefit businesses which sell goods and services to entities and persons engaged in forestry enterprises because these tribal programs afford protection and encouragement to the

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3/ Petitioners previously sought to intervene and consolidate this case with ITT Rayonier, Inc. v. Quinault Indian Nation, 163F (W.D. Wash. 1980), CR 48-52. That case also involved a challenge to the Quinault tax by ITT Rayonier which is in the business of harvesting timber from trust and fee land within the Quinault Reservation. Before Petitioners motion came on for consideration that case was settled, CR 55, as a result of which ITT agreed to pay taxes reserving a right to protest future taxes. Still pending before the District Court is the motion to intervene by Mayr Brothers Logging Co. CR 77-78, 87. Mayr Brothers also is involved in harvesting timber from trust land.

forestry commerce which creates their business revenues. See, Anderson v. O'Brien, 524 P.2d 390, 394 (Wash. 1974) (economic multiplier or ripple effect of economic development programs).

Funding for tribal government programs comes from federal contracts, from earnings of tribal owned businesses, and tribal taxation. CR 65. Federal funding is aimed at promoting the economic and political ability of the Tribe to carry out governmental programs affecting the Reservation. Federal funding, which is not permanent by design, is cumbersome, inflexible, and diminishing. Appropriations by the Quinault Nation from earnings of tribal seafood and forestry businesses are limited and deprive those enterprises of capital needed for investment and development. Tribal businesses are also subject to the tribal business tax.

Because federal contracts and tribal businesses do not provide all funding needed to tribal government programs, the Quinault Nation has enacted taxes. Some of these taxes are imposed solely on Indians engaged in harvesting fish and clams pursuant to treaty rights. CR 65 at 2-3. Other taxes apply evenhandedly to Indians and non-Indians, such as the tax in this case.

Detailed affidavits submitted by Respondents establish the foregoing facts. Most of the Petitioners did not file any opposing affidavits. Petitioners Snow, Sansom and Rasmussen submitted conclusory affidavits asserting that they receive police, fire and education services from the state and: "That neither I nor other residents of Amanda Park receive any services from the Quinault Indian Nation. All services

are provided by the State of Washington and the County of Grays Harbor, for which the residents of Grays Harbor are taxed." CR 30-32, 95. Petitioners did not deny that they do business with the Quinault Nation or with individual Indians; that the Quinault Nation encourages and promotes Reservation tourism, especially in the area around Lake Quinault; that the Quinault Nation has protected and improved domestic and recreational water quality on Lake Quinault; that the Quinault Nation stocks fish in Lake Quinault, regulates fishing, swimming and boating on the Lake; that governmental activities of the Quinault Nation protect and promote commerce in forest industries throughout the Reservation; or that Petitioners do business with people who are on the Reservation to harvest timber from trust lands. The two courts below were not persuaded that Petitioners con-

clusory denials met the burden imposed by  
FRCP 56(e) to controvert by specific  
facts the evidence set forth in Respon-  
dents' affidavits. 4/

Through the tax being challenged  
the Quinault Indian Nation seeks to raise  
revenue to support governmental services  
it provides throughout the Reservation.  
Major business activities within the  
Reservation are forestry (which accounts  
for 90% of all jobs and commerce),  
fishing and tourism. A minimal tax is

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4/ Rule 56(e) provides in part: "When a  
motion for summary judgment is made and  
supported as provided in this rule, an  
adverse party may not rest upon the mere  
allegations or denials of his pleadings,  
but his response by affidavit or as  
otherwise provided in this rule, must  
set forth specific facts showing that  
there is a genuine issue for trial."  
Moreover, some of the statements made in  
affidavits by Petitioners Snow, Sansom  
and Rasmussen were not shown to be made  
on personal knowledge, as required by  
rule 56(e). How do they know what services  
Bertrand, a Quinault Indian, receives from  
the Tribe or whether Bertrand resides on  
non-Indian land?

imposed on Reservation business activity in which the Tribe has a significant interest. The annual Quinault Tax is measured by the number of persons employed by the business within the Reservation--generally \$25.00 per employee. A tax of \$100.00 is imposed on attorneys practicing law in Tribal Court.5/

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5/ Petitioners Snow, Rasmussen and Sansom employ 8 people, none of whom are Indians. The maximum annual tax which these three Petitioners might owe collectively is between \$200.00 and \$250.00. Petitioner Sansom's affidavit attempted to portray his two person gas station business as a conglomerate with separate divisions for soda machine, gas, garage, towing, etc., in order to manufacture a claim that he had been "assessed" \$500.00 in taxes. Of course, such a tax on a diversified conglomerate would not be onerous. In fact, however, neither he nor any of the other Petitioners has ever been "assessed" any taxes. CR 44, App.L. (The only exception is Petitioner Thomas, who paid the tax on attorneys practicing law in Tribal Court.) Petitioner Sansom never sought tribal administrative or judicial review of his artificial segmentation of his business. CR 44, App.L. In reality, Petitioner Sansom may owe a maximum tax of \$50.00 or \$100.00.

In order to encourage employment of Indians, a tax credit is available to any business employing Indians which reduces the tax rate by one-half for each Indian employee. Rule 2.40(7)(a), CR 44, App. D. 6/

Petitioners deliberately bypassed available tribal administrative and judicial fora, asserting an immunity to any tribal taxing jurisdiction under any circumstances. CR 44, App. L and CR 15, App. K. According to Petitioners, tribes lack power to tax because such power derives exclusively from "basic tenets of Anglo-Saxon powers of raising revenue."

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6/ In 1978, the rate of unemployment of Quinault Indians was 45.1%, which was 5.7 times greater than the Washington state rate and 7.2 times greater than the national rate. CR 44, App. C. Unemployment climbed sharply after 1978, with the effects of the recession being accutely felt in the Reservation forest products industry.



Respondents do not challenge whether Petitioners receive some state services or whether Petitioners pay state taxes. Respondents have not claimed that tribal tax jurisdiction preempts state tax jurisdiction. Respondents do claim that businesses which engage in commerce with Indians or that receive substantial benefits from intentionally engaging in Reservation commerce encouraged and protected by the Quinault Nation are subject to tribal tax jurisdiction. Respondents have not attempted to tax activities with the Reservation which receive no significant benefits from the tribal government.

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7/ But see, e.g., Huang, Taxation and Government Finance in Sixteenth Century Ming China; van der Sprenkel, Legal Institutions in Manchu China 43-49 (1972).

### III

#### Reasons to Deny the Writ

##### A. Not a Case of National Significance

Petitioners have never been assessed nor have they ever paid any tribal taxes.<sup>8/</sup> Petitioners never sought tribal administrative or judicial review of their claims. The amount of taxes, if any, which the Quinault Nation may seek from the various Petitioners depends on a case-by-case determination that has yet to occur. On this uncertain record, this case is premature for review by this Court and does not raise issues of national importance.

##### B. Decisions Below Correctly Reject Petitioners' Absolute Immunity Arguments

Tribal government jurisdiction to tax was reaffirmed in Merrion v. Jica-

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<sup>8/</sup> The only exception is Petitioner Thomas who paid the tax on attorneys practicing law in the Tribal Court.

rilla Apache Tribe, 455 U.S. 130, 137 (1982), as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." This power derives in part from traditional governmental authority to defray the cost of providing services by requiring contributions from those benefiting from those services. Id. at 137-138. See also, Morris v. Hitchcock, 194 U.S. 384 (1904). In Montana v. United States, 450 U.S. 544 (1980), this Court noted that tribes retain civil jurisdiction to tax non-Indians on fee land who engage in commercial and consensual relationships with a Tribe or its members and that a Tribe also has jurisdiction over non-Indians on fee lands whose conduct threatens or has some direct effect on the political integrity, economic security, health or welfare of the Tribe

or its members. See also, Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).

Applying these and other decisions of this Court, the courts below correctly rejected Petitioners' argument that tribes have no power to tax. The courts below held that Indian tribes retained jurisdiction to tax, consistent with overriding federal interests, as a fundamental attribute of their sovereignty. Washington v. Confederated Colville Tribes, 447 U.S. 134, 152-154 (1980). Since the record establishes that Petitioners do business with the Tribe and its members, and that Petitioners benefit from extensive tribal government programs promoting and enhancing tourism and forestry related businesses on the Quinault Reservation, tribal jurisdiction to tax such businesses was appropriately found by the

District Court. Merrion v. Jicarilla Apache Tribe at 137-138. 9/ That some of the Petitioners are non-Indians, and that some of them do business on fee land does not immunize them from this tribal tax. Buster v. Wright, 135 Fed. at 950-952, discussed in Merrion, 455 U.S. at 143.

Although the fact that Petitioners do business with the Tribe and its members is dispositive, other considerations

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9/ Petitioners realize substantial benefits as a result of tribal programs encouraging and facilitating tourism and forestry. Moreover, the Quinault Tribal Court is available as a forum where Petitioners can resolve legal disputes growing out of their admitted business and other dealings with tribal members and the Tribe itself. Williams v. Lee, 358 U.S. 217 (1959). The availability of the Tribal Court to resolve disputes growing out of those transactions supports a tax. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). This applies with special force to attorneys who earn part of their living by practicing law in Tribal Court. Maxey v. Wright, 54 S.W. 807 (Ind. Terr.), aff'd, 105 Fed. 1003 (8th Cir. 1900); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1147 (8th Cir. 1973).

support the Tribe's tax. Paramount among these is that Petitioners have intentionally engaged in Reservation tourism and forestry businesses that are inextricably tied to the exploitation of the Reservation's trust resources. Comprehensive tribal programs managing, enhancing, and regulating Lake Quinault make swimming, boating, fishing and other recreational pursuits in the Lake Quinault-Amanda Park area safe and attractive. See, New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983). Protecting and enhancing the water quality of Lake Quinault benefits not only tourists, but also Petitioners, their families and employees.<sup>10/</sup> Broad

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<sup>10/</sup> Clean water, like clean air, has been found by Congress to be in the public interest. 33 U.S.C. Section 1251. Nance v. EPA, 645 F.2d 701, 716 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). See Clean Air Act, 42 U.S.C. Sec. 4747(c); Clean Water Act, 33 U.S.C. Sec. 1362(4).

ranging tribal programs regulating forest practices, rehabilitating damage to the fishery caused by logging activities, providing emergency medical services, maintenance of roads providing access to forest lands, providing protection against forest fires and theft of forest products, etc. similarly benefit businesses depending upon the forestry industry for their revenue. The tribal tax is clearly appropriate when directed to businesses like those of Petitioners which avail themselves of the benefits of tribal programs. Likewise for attorneys practicing law in Tribal Court. "The simple but controlling question is whether the [Tribe] has given anything for which it can ask a return." Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940). The benefit Petitioners receive is the substantial benefit of increased revenue and busi-



ness opportunities. National Meat v. Deukmejian, 562 F.Supp. 357, 361 (E.D. Cal. 1983).<sup>11/</sup>

The tribal government has significant political, economic and other interests in exacting a fair share of the cost of providing those services "through taxation of non-Indians who benefit from those services." Merrion v. Jicarilla Apache Tribe, 455 U.S. at 140. See, Commonwealth Edison v. Montana, 453 U.S. 609, 616 (1982); Washington v. Confederated Colville Tribes, 477 U.S. at 152. "Under these circumstances there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of govern-

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<sup>11/</sup> The economic multiplier or ripple effect of the expenditure of tribal funds in these programs itself creates additional reservation business opportunities. Anderson v. O'Brien, 524 P.2d 390, 394 (Wash. 1974).

ment." Merrion v. Jicarilla Apache  
Tribe, 455 U.S. at 138.

Given the state of the record in this case--a challenge to a tax before it goes into effect, and where there has been no assessment or payment of taxes--all the decisions below could do is restate, as they did, a generally established principle of law; that is, those reservation businesses which do business with a Tribe or its members or who receive business benefits from tribal programs are subject to tribal taxation. More concrete issues will be presented by some other case where taxes have actually been assessed and collected.<sup>12/</sup>

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<sup>12/</sup> The Quinault Tax Statute of Limitations Act establishes a procedure by which taxpayers can pay the tax under protest and then file a complaint in Tribal Court contesting any issue regarding the amount or jurisdiction of the Tribe to impose the tax.

C. Reservation Businesses Dealing With  
Indians And Benefiting From Tribal  
Services May Be Taxed Whether On  
Trust Or Fee Land

Contrary to Petitioners' assertion, the Court of Appeals did not recognize tribal jurisdiction to tax non-Indians simply because they are within the Reservation, nor did the Court of Appeals accept Petitioners' claim that those who are doing business on fee land are necessarily immune from tribal taxation. Petitioners concede that the District Court's opinion, Pet. A15-23, follows the guidelines set by this Court. Pet. at 18 n.7. The opinion of the District Court as well as the record on which it rendered its decision were before the Court of Appeals. Since the Court of Appeals affirmed the District Court's careful opinion granting summary judgment, Petitioners' argument that the Court of Appeals autho-

rized tribes to tax non-members regardless of the facts is pure hyperbole.

The record establishes both that Petitioners engage in commercial and consensual dealings with the Tribe and its members and that their exploitation of reservation timber resources and tourism trade affects the political integrity, economic security and welfare of the Tribe and its members. The tax thus can be justified under either of the alternative standards discussed in Montana.<sup>13/</sup>

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<sup>13/</sup> That the Court of Appeals did not endorse a "carte blanche" territorial approach to jurisdiction over non-Indians on fee land is evident from its discussion of Montana. Enlightening in this respect is the Court of Appeals citation of Swift Transportation Co. v. John, 546 F.Supp. 1185 (D. Ariz. 1982). The District Court there enjoined a civil action for damages in the Navajo Tribal Court growing out of a collision between a non-Indian owned truck and Navajo Indians. The truck was on a highway traversing the Navajo Reservation which the District Court equated with fee land.

The fact that land is fee patented is not an absolute bar to tribal jurisdiction, as Petitioners apparently believe. Fee lands remain a part of the Reservation. Confederated Salish & Kootenai Tribes v. Moe, 425 U.S. 463, 478-479 (1976); United States v. Mazurie, 419 U.S. 544, 553-556 (1974); Superintendent v. Seymour, 368 U.S. 351 (1962). All lands within an Indian reservation, including fee patented lands, are a part of "Indian country." 18 U.S.C. Section 1151. DeCoteau v. District Court, 420 U.S. 425, 427 n.2 (1975). The fact that land is fee patented is a factor that must be

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<sup>13/</sup> (footnote continued from previous page) The truck was only temporarily passing through the Reservation. If the Court of Appeals was applying a pure territorial approach to tribal jurisdiction, as Petitioners contend, it is difficult to understand why the Court of Appeals relied upon Swift, which eschews a pure territorial approach.

considered in assessing relevant tribal interests, but it is to be considered together with other factors which shed light on whether, in a particular case, significant tribal interests justify the exercise of tribal jurisdiction. Here, Petitioners dealt with the Tribe and its members and took advantage of business opportunities created by the Tribe to promote reservation economic development. These matters directly implicate tribal interests of paramount importance. Many of these tribal programs are approved and financed under congressional enactments specifically intended to foster tribal economic and political self-sufficiency. White Mountain Apache v. Bracker, 448 U.S. 136, 143 n.10 (1980). Federal funding of these programs are not intended as permanent operating subsidies, but as seed money to help tribes initiate

programs that will sustain themselves through reservation sources.<sup>14/</sup> In Merrion, this Court agreed that "it simply does not make sense to expect tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers." 455 U.S. at 138 n.5. Since the Tribe promotes development of Reservations's tourism and forestry resources from which Petitioners derive business revenue, "there is nothing exceptional in requiring Petitioners to contribute through taxes to the general cost of tribal governments." Merrion v. Jicarilla Apache

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<sup>14/</sup> President Reagan established a Commission in January of 1983 to advise on how to promote Reservation economic development without promoting dependence on federal financial assistance. App. B to this Brief.

Tribe, 455 U.S. at 138. Petitioners' claim that there is absolutely no tribal jurisdiction to tax businesses operating on fee land which affect significant tribal interests was property rejected by the Court of Appeals.

D. No Conflict With Dry Creek Case

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), this Court considered a challenge under the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1301, to the Pueblo's enrollment criteria by an unenrolled non-member. The Court reconfirmed the doctrine of tribal sovereign immunity. The Court also held that tribal fora were required to apply the remedial provisions of the ICRA but that Congress had not manifested an intent to create a federal cause of action for ICRA claims. The Court noted that "Tribal Courts have repeatedly been recognized as appro-



priate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 435 U.S. at 66. Although Congress has the power to create a federal cause of action, 435 U.S. at 72, it has not acted to do so in the 5 1/2 years since Martinez was decided.

Despite Martinez, Petitioners assert there should be federal court review of their ICRA claim that a tribal tax credit to any business which employs Indians on the Reservation violates equal protection or due process of tribal laws. Petitioners rely on Dry Creek Lodge, Inc. Shoshone and Arapahoe Tribes, 623 F.2d 682 (10th Cir. 1980), which dealt with a unique problem. A dispute arose between non-Indian owners of the Lodge and the tribal government of the Wind River Reservation. Tribal

officials blockaded the road providing access to the Lodge so that persons at the Lodge could not get out. Therefore, the parties at the Lodge sought a forum in the tribal court. They were denied access to the tribal court by the tribal judge and tribal council. The Court of Appeals rejected the argument that there was no federal cause of action, since otherwise there would have been no forum available to the Dry Creek Plaintiffs. 623 F.2d at 685. The Tenth Circuit subsequently cited Dry Creek to its unique facts, stating "That case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action." Ramey Construction Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319 n.4 (10th Cir. 1982. Accord, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324,

1345-1346 (10th Cir. 1982). In Kenai Oil & Gas Co. v. Andrus, 522 F.Supp. 521, 530 (D. Utah 1981), the District Court read Dry Creek narrowly as meaning "that where no tribal remedy is available a plaintiff may have access to a federal forum." Assertion that resort to a tribal forum would be futile is not sufficient. The District Court said there must be an actual attempt at seeking a tribal remedy which shows that none exists. Id. at 530-531.<sup>15</sup>/

Petitioners in the present case never submitted any of their claims to any tribal administrative or judicial

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<sup>15</sup>/Tenth Circuit and lower court decisions limiting Dry Creek to its unique facts are quite likely based on a realization that Dry Creek is "clearly wrong," F. Cohen, Handbook of Federal Indian Law, 668 n.52 (1982), because it squarely conflicts with this Court's holding in Martinez.

fora. The Quinault Tribal Court, which is an independent court under the Quinault Constitution, was available at all times with a panel of lay and lawyer judges capable of considering Petitioners' claims. Unlike Dry Creek, therefore, what kept Petitioners from submitting their claims to the Tribal Court was their own deliberate decision to bypass that remedy. Dry Creek is obviously distinguishable on its unique facts. There is no Circuit conflict that needs to be resolved.

E. Quinault Tax is Nondiscriminatory

Petitioners' claim that the Quinault tax is discriminatory because it offers a tax credit to any business which employs Indians on the Reservation. The tax credit is available to Petitioners any time they employ an Indian. The tax credit is consistent with 42 U.S.C. Section 2000e-2(i), the Targeted Jobs Tax Credit, 26 U.S.C. Sections 44B, 51,

and 53, and similar enactments. The tax credit is reasonable and lawful. Morton v. Mancari, 417 U.S. 535 (1974).

#### IV

##### No Fifth Amendment Delegation Problem

Tribal power to tax derives from the original sovereignty of Indian tribes. Washington v. Confederated Colville Tribes, 447 U.S. 134, 152-153 (1980). Since this power was not delegated to Tribes by Congress, Petitioners' Fifth Amendment delegation argument is insubstantial. Hagans v. Lavine, 415 U.S. 528 (1974). 16/

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16/ Pursuant to the Quinault Treaty and the Commerce Clause, Congress has broad power to legislate in the field of tribal taxation. Santa Clara Pueblo v. Martinez, 436 U.S. at 56-57; Morris v. Hitchcock, 194 U.S. at 392; Buster v. Wright, 135 Fed. at 953-955. A case in point is the Indian Tribal Government Tax Status Act of 1982, P.L. 970473, Section 202(a), which affords a federal tax deduction under 26 U.S.C. Section 164 for business taxes paid to tribes. If particular tribal taxes are thought to be contrary to overriding federal interests, that determination is to be made by Congress, Commonwealth Edison Co. v. Montana, 435 U.S. at 628, where, of course, Petitioners are represented.

V

Conclusion

The Writ should be denied.

Respectfully submitted,

*Michael P O'Connell* *by HLC*

Michael P. O'Connell  
Reservation Attorney

November 26, 1979

Ralph. I. Thomas  
Stewart & Thomas, Inc., P.S.  
101 First Street South  
Montesano, WA 98563

Re: Quinault Tax

Dear Ralph:

The case continues to remain in a pending status before the Honorable Judge Tanner of the United States District Court sitting in Tacoma, Washington. In the last month, I have spoken with the Judge's law clerk who informs me that the Quinault tax case is one of many which they hope to get to some time in the not too distant future. Apparently they are facing a rather substantial case load and, even though this case is ready for decision on cross-motions (my motion for summary judgment and the tribe's motion to dismiss), the court simply has not had time to get to it.

As a consequence, I certainly wouldn't pay the tribal tax to appear before the tribal court if I were you.

I will keep you advised of developments.

Very truly yours,

KARGIANIS & AUSTIN

/s/

Ronald P. Erickson

RPE/ck

Federal Register

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Title 3-

The President

Presidential Documents

Executive Order 12401 of

January 14, 1983

Presidential Commission on Indian  
Reservation Economies

By the authority vested in me as President of the United States of America, and in order to establish in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), an advisory commission to promote the development of a strong private sector on Federally recognized Indian reservations, it is hereby ordered as follows:

Section 1. Establishment (a) There is established a Presidential Commission on Indian Reservation Economies.

(b) The Commission shall be composed of no more than nine members, who shall be appointed by the President from among the private sector, reservation tribal



governments, economic academicians, and Federal employees.

(c) The President shall designate a non-Indian representative and an Indian representative to serve as cochairmen of the Commission.

Sec. 2. Functions (a) The Commission shall advise the President on what actions should be taken to develop a stronger private sector on Federally recognized Indian reservations, lessen tribal dependence on Federal monies and programs and reduce the Federal presence in Indian affairs. The underlying principles of this mission are the government-to-government relationship, the established Federal policy of self-determination and the Federal trust responsibility.

(b) The Commission will focus exclusively on the following items, and not on new Federal financial assistance:

(1) Defining the existing Federal legislative, regulatory, and procedural obstacles to the creation of positive economic environments on Indian Reservations.

(2) Identifying and recommending changes or other remedial actions necessary to remove these obstacles.

(3) Defining the obstacles at the State, local and tribal government levels which impede both Indian and non-Indian private sector investments on reservations.

(4) Identifying actions which these levels of government could take to

rectify the identified problems.

(5) Recommending ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

(c) The Commission should review studies undertaken in the last decade to obtain pertinent recommendations that are directly related to its mission.

(d) The Commission shall, unless sooner extended, submit a final report to the President and to the Secretary of the Interior within six months after appointment of the last Commissioner, or by September 30, 1983, whichever comes earlier.

Sec. 3 Administration (a) The heads of Executive agencies shall, to the extent permitted by law, provide the Commission with such information as may be necessary for the effective performance of its functions.

(b) Members of the Commission may receive compensation for their work on the Commission. While engaged in the work of the Commission members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the government service (5 U.S.C. 5701-5707).

(c) The Secretary of the Interior shall, to the extent permitted by law and subject to the availability of funds, provide the Commission with such administrative services, funds, facili-

ties, staff and other support services as may be necessary for the effective performance of its functions.

(d) The Commission will meet approximately 15 times at the call of the chairmen. All meetings of the Commission and all agenda must have prior approval of the chairmen.

(e) In carrying out its responsibilities, the Commission is authorized to:

(1) Conduct hearings, interviews, and reviews at field sites, or wherever deemed necessary to fulfill its duties.

(2) Confer with Indian tribal government officials and members, private sector business officials and managers, and other parties dealing with matters pertaining to the Commission's mission.

Sec. 4 General Provisions (a) Notwithstanding the provisions of any other Executive order, the responsibilities of the President under the Federal Advisory Committee Act, as amended, except that of reporting annually to the Congress, which are applicable to the advisory commission established by this Order, shall be performed by the Secretary of the Interior, in accordance with the guidelines and procedure established by the Administrator of General Services.

(b) The Commission shall terminate 60 days after it transmits its final report to the President, or on December 31, 1983, whichever comes earlier.

THE WHITE HOUSE      January 14, 1983

THE WHITE HOUSE

Office of the Press Secretary

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For Immediate Release     January 24, 1983

STATEMENT BY THE PRESIDENT

INDIAN POLICY

This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be chartered by the tribes, not the federal government.

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

#### Tribal Self-Government

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions -- enforcing, tribal laws, developing and managing tribal resources, providing health and

social services, educating children -- are frequently still carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacities, this Administration has developed through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other



blocks to the states consolidated dozens of categorical federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive federal regulation, and provide for more local control. This Administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with state and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this Administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U.S.C. 4273) to include a representative of Indian tribal governments. In the interim before Congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian tax laws as applies to other governments with essentially the same treatment



under federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Education Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first step in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing

reservation economies.

### Development of Reservation Economies

The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective. As a result, involvement of private industry has been limited, with only infrequent success. Developing reservation economies offers a special challenge: devising investment procedures consistent with the trust status; removing legal barriers which restrict the type of contracts tribes can enter into and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services. They also often lack the regulatory, adjudicatory and enforcement mechanisms necessary to interact with the private sector for reservation economic development. Development on the reservation offers potential for tribes and individual entrepreneurs, in manufacturing,

agribusiness and modern technology, as well as fishing, livestock, arts and crafts and other traditional livelihoods.

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods to developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of

a financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This Administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all

levels; examine and recommend changes in federal law, regulations and procedures to remove such obstacles; identify actions state, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with the responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the federal role be fully reviewed and coordinated. Therefore, this Administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that federal activities are non-duplicative, cost effective, and consistent with the goal of encouraging self-government with a minimum of federal interference.

### Summary

This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

This Administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialogue with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

This nation's economic health -- and that of the tribes -- depends on adopting this Administration's full Economic Recovery Program. This program calls for eliminating excessive federal spending and taxes, removing burdensome regulations, and establishing a sound monetary policy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.

Attachment

REAGAN ADMINISTRATION  
INDIAN POLICY INITIATIVES

Request that Congress repudiate House Concurrent Resolution 108 of the 83rd Congress which called for termination of the federal-tribal relationship. The Administration wants this lingering threat of termination replaced by a resolution expressing its support of a government-to-government relationship.

Ask Congress to expand the authorized membership of the Advisory Commission on Intergovernmental Relations to include a representative of Indian tribal governments. In the interim, request that the Assistant Secretary of the Interior for Indian Affairs join the ACIR as an observer.

Move the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs.

Establish a Presidential Advisory Commission on Indian Reservation Economies to identify obstacles to economic growth and recommend changes at all levels; recommend ways to encourage private sector involvement, and advise the President what actions are needed to create a positive environment for the development and growth of reservation economies.

Support direct funding to Indian tribes under the Title XX social services block grant to states.



Sought and obtained funds for FY 1983 to implement the Small Tribes Initiative to provide financial support needed to allow small tribes to develop basic tribal administrative and management capabilities.

Sought and obtained funds for FY 1983 to provide seed money for tribes for economic development ventures on reservations.

Supported and signed into law the Tribal Governmental Tax Status Act which will provide tribal governments with the same revenue raising and saving mechanisms available to other governments.

Support the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

Direct the Cabinet Council on Human Resources to act as a review and coordination mechanism to ensure that federal activities are non-duplicative, cost effective and consistent with the goal of encouraging tribal self-government with a minimum of federal interference.



No. 83-595

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

**OCTOBER, 1983**

**KENNETH R. SNOW, ROY HULL,**  
**and GUY J. SANSON,**

*Petitioners,*

v.

**QUINAULT INDIAN NATION, a/k/a QUINAULT TRIBE;**  
**QUINAULT TRIBAL COUNCIL; and EDYTH E. CHENOWE,**  
*Respondents.*

**BRIEF OF STATES OF WASHINGTON AND  
MONTANA AS AMICI CURIAE IN SUPPORT  
OF PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT**

**KENNETH O. EKENBERRY,**  
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IN THE  
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KENNETH O. EIKENBERRY,  
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## QUESTIONS PRESENTED

I. Does the power of tribal self-government, as recognized by federal law, include the power to tax a non-Indian's business conducted on land owned in fee by the non-Indian within the boundaries of the tribe's reservation?

II. Do the equal protection guarantees of the Fifth Amendment of the United States Constitution prohibit Congress from authorizing or allowing an Indian Tribe to impose a tax upon a non-Indian reservation resident who, though a United States citizen, has none of the rights of participation in tribal government enjoyed by tribal members?

III. Does 25 U.S.C. § 1302(8), which provides that "No Indian tribe in exercising the power of self-government shall \* \* \* deny to any person within its jurisdiction the equal protection of its laws \* \* \*" create a federal right which is enforceable in the federal courts through declaratory or injunctive relief by non-Indians who are subject to a discriminatory tribal tax?

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IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES  

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OCTOBER, 1983

KENNETH R. SNOW, ROY HULL,  
and GUY J. SANSOM,

*Petitioners,*

v.

QUINULT INDIAN NATION, a/k/a QUINULT TRIBE;  
QUINULT TRIBAL COUNCIL; and EDYTH E. CHENOIS,  
*Respondents.*

---

**BRIEF OF STATES OF WASHINGTON AND  
MONTANA AS AMICI CURIAE IN SUPPORT  
OF PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT**

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**INTEREST OF THE STATES OF WASHINGTON  
AND MONTANA**

In the State of Washington, there are twenty-five Indian Reservations. The population and land ownership patterns on these Reservations, which give rise to the State's concern in this case, are not unfamiliar to this Court from previous cases.<sup>1</sup>

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<sup>1</sup>See *Puyallup Tribe v. Washington Department of Game*, 391 U.S. 392, at 395, n. 1 (1968), and 433 U.S. 165, at 174 (1977) (*Puyallup Reservation*); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, at 193, n. 1 (1978) (*Port Madison Reservation*); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 143, 144 (1980) (*Colville, Lummi*,

Much of the land on these reservations has passed into non-Indian ownership, pursuant to federal policies which, though initiated in the last quarter of the last century,<sup>2</sup> continue in their effect to this day. According to 1980 census data, some 79,000 persons live within twenty-three of these reservations, of whom some 16,000 are Indians, and the rest, some 63,000, are non-Indians.<sup>3</sup>

Although not as accentuated, the pattern in Montana is similar. There are seven reservations, with a total population of some 50,000 persons, of whom some 24,000 are Indians and the rest, about 26,000, are non-Indians. And nation-wide the pattern is almost identical to that in Montana. There are 268 reservations, located in 33 states, with a total population of 682,000, of which slightly more than half are non-Indian.<sup>4</sup>

The interest of the two amici States in this case is two-fold. First, there is the same interest which prompted the participation of the Washington Attorney General as

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Makah, and Yakima Reservations); and *United States v. Mitchell*, — U.S. — (1983), 51 L.W. 4999, 5000.

<sup>2</sup>These policies were principally embodied in the General Allotment Act of 1887, 24 Stat. 388.

<sup>3</sup>Two of the twenty-five have no population at all. See General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages," pp. 1-300 through 1-303. We have taken from this table, and reproduced as Appendix A of this brief a list of every reservation (excluding Alaska Native Villages) the total population for each, and the Indian population for each. The classification in this table, it should be noted, allows only an approximation of tribal and non-tribal members, since some Indians may well not be members of the tribe on whose reservation they reside.

These non-member Indians are, vis-a-vis the Tribe, in the same legal status as non-Indians. Cf. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 161 (1980). And our concern, accordingly, extends to them as well. We shall, however, use in this brief the Census Bureau classification, "Indian" and "Non-Indian", rather than "member" and "non-member".

<sup>4</sup>See Appendix A. The above totals include Washington and Montana.



amicus curiae in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and which similarly prompted the Montana Attorney General to resist the jurisdictional claims of the Crow Tribe in *Montana v. United States*, 450 U.S. 544 (1981), reversing 604 F.2d 1162 (9th Cir. 1979). Simply put, that interest is in protecting a large group of the State's citizens from the power of a tribal government in which they cannot participate or even influence the formulation of tribal decisions, and whose actions, even when discriminatory, can only be avoided by giving up their present homes or businesses and moving off the reservation. After *Oliphant*, protection exists in the criminal area. But at least in the Ninth Circuit, little, if any, exists in the civil area.<sup>5</sup>

Second, if the decision below stands, we fully expect to be facing claims that tribal assertions of civil jurisdiction over non-Indians on non-Indian land preempt state and local jurisdiction, not only in the area of taxation, but in other areas as well, such as land use, building codes, and regulation of rights to surplus waters.<sup>6</sup> A reversal of the decision below would, we believe, significantly reduce future litigation between the Tribes and the States or their local governments, of which we have had enough already.

### REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW AFFECTING INDIANS AND NON-INDIANS NATIONWIDE WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

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<sup>5</sup>And this is so even after *Montana v. United States*.

<sup>6</sup>The preemption claim is already being asserted by at least one Washington Tribe. See *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, No. C 83-604-JLQ, U.S. District Court, Eastern Dist. Wash., in which the Yakima Tribe is attempting to enjoin the application of the Yakima County zoning regulations to a development by a non-Indian on his own land within the exterior boundaries of the Yakima Reservation.

### A. Introduction: The Relationship Between the Issues.

Before discussing each of the Questions Presented separately, a word regarding their relationship to each other may be helpful. As a result of the lower court's decision, Indian Tribes in States encompassed by the Ninth Circuit find themselves in the happy position of being completely unfettered in their governance of non-Indians. And the tens of thousands of non-Indians who happen to live within the reservations of these tribes—even though on their own land—are in quite the opposite position.<sup>7</sup> For the tribal governments are, with respect to these non-Indians, free of the major political and legal constraints to which other governments, federal, state and local, are subject.

"A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them'." *Powell v. McCormack*, 395 U.S. 486, at 547 (1969). And as stated in *Nevada v. Hall*, 440 U.S. 410, 426 (1979), "In this Nation each sovereign governs only with the consent of the governed." For the Petitioners, however, who lawfully reside on the Reservation at the invitation of the United States (see, page 8, *infra*), this "fundamental principle" has become a nullity. As non-members of the Tribe, they cannot participate in the exercise of the tribal governmental power to which they are now subject. And the Tribe is completely free, in the exercise of that power, from the political constraints which this participation would entail.

The situation becomes even worse for the Petitioners—and better for the Tribe—because the decision below jettisons a second fundamental principle of our democratic system. In addition to the inherent constraints on governmental power imposed by requiring the consent of the gov-

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<sup>7</sup>In Washington and Montana alone, there are about 89,000. See p. 2, *supra*. The number for each of the other states is computable from Appendix A.

erned, there are the external constraints, imposed by federal and state constitutions and enforced by a system of state and federal courts, which culminates in this Court, as the ultimate guarantor of our federal constitutional rights. But ever since *Talton v. Mayes*, 163 U.S. 376 (1896), even federal constitutional constraints have been held inapplicable to tribal governments, at least insofar as tribal members are concerned.

In an effort to fill this constitutional gap, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. But whatever protection that may have provided to the Petitioners has been effectively nullified by the court below. For it has made the federal courts off-limits to those who would invoke those courts to enforce the rights conferred by that Act, except where their person is constrained and habeas corpus is available.

Thus, for the Petitioners and for all those similarly situated in the Ninth Circuit, the court below has created a system of governmental power which is subject neither to democratic control nor to external legal controls. The absence of one set of controls worsens the consequences which flow from the absence of the other, as is shown by the facts of this case. Not only are the Petitioners taxed by a government in which they can have no participation; the type of tax imposed by that government is not subject to effective legal challenge, no matter how discriminatory it might be.

Did the Congress intend that Petitioners would be subject to such a system? And if so, is it constitutionally permissible for the Congress to adopt such a system? These are the fundamental issues raised by the questions presented, to which we now briefly turn.

**B. Whether An Indian Tribe May Validly Impose A Tax Upon For Non-Indian Reservation Residents For Conducting A Business On Their Own Land Is An Issue Of Nationwide Importance That Should Be Resolved By This Court.**

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) this Court held (with Stevens, J., Burger, C.J., and Rehnquist, J., dissenting) that an Indian Tribe has the power to impose a tax upon non-Indians producing oil and gas upon *tribal lands*. The first question presented involves the scope of that decision. Does it apply as well to non-Indians, such as the Petitioners, engaging in business activities upon their own lands rather than upon Indian lands? The court below held that it did.

In so holding, the court took a huge step which, creates the major problem which concerns the States here and which, far from being required by *Merrion*, was absolutely contrary to what the Court there said about the scope of tribal government power.

<sup>640</sup> We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters *tribal lands* or conducts business with the tribe." *Merrion*, 455 U.S. at 142.<sup>6</sup> (Emphasis supplied)

The source of this tribal power, however, is not merely the Tribe's power as a landowner. For the opinion immediately continues:

"\* \* \* However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal

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"With respect to the second element in this "territorial component," i.e., conducting business with the Tribe, Petitioner Snow sells tribal fishing permits to tourists at his general store in Amanda Park, and the Tribe maintains an account there. Pet. App. A-19. The record, however, shows no business conducted with the tribe by either of the other two Petitioners. The opinion of the court below made no mention of these minimal dealings with the Tribe by Petitioner Snow, since its rationale was in no way dependent upon the existence of such dealings. Thus, under the opinion below, the only way for the Petitioners to avoid the tribal tax is to cease all on-reservation business completely. Simply ceasing all business with the Tribe will not suffice, despite this Court's statement to the contrary in *Merrion*.

Further, under the opinion below, the door is now open to a property tax on non-Indians' homes, and a tax on their income—taxes which they can avoid only by moving off the reservation. Simply avoiding any business contacts with Indians will not suffice.

authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands." *Id.*

Indeed, the Court had already established two years before that the source of the taxing power is retained tribal sovereignty, but that this power also is limited by the territorial component spoken of in *Merrion*.

"In *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134 \* \* \* (1980) (*Colville*), we addressed the Indian tribes' authority to impose taxes on non-Indians doing business on the reservation. We held that '[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Id.*, at 152. \* \* \*" 455 U.S. at 137 (Emphasis supplied)

The court below has now jettisoned this territorial component which had been recognized in *Merrion* and, before that, in *Colville*. By so doing, it has made some 89,000 persons in Washington and Montana and about four times that number nationwide potentially subject to the unfettered power of Indian tribes. And not just taxing power, but all the other governmental powers which are included within the concept of "sovereignty" are now involved.

The court below may have been bothered by a question which it never expressly articulated, and which may also concern this Court. State sovereignty, after all, and indeed all sovereignty as we normally think of it, extends to all private persons and private lands within the sovereign's boundaries. Why should tribal sovereignty be any different?

The answer, of course, is simply that tribal sovereignty is different because Congress intended it to be different. For non-Indians, the territorial component is, in the final analysis, congressionally created, by the federal legislation which invited the non-Indians onto the reservations as landowners and residents in the first place.

This is shown by *Montana v. United States*, 450 U.S. 544 (1981). The crucial difference between the taxpayers in *Merrion* and the Petitioners here is that the Petitioners are in the same position as the landowners in *Montana*. That is, they or their predecessors were invited by the Congress onto the reservation to become landowners there, under the allotment policy which Congress adopted in the late 19th Century. See *Montana*, 450 U.S. at 559 n. 9. As there stated:

"There is simply no suggestion in the legislative history [of the allotment acts] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. [citations omitted] *It defies common sense to suppose the Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." (Emphasis supplied)

Moreover, this territorial component is grounded in treaty provisions as well. As also shown by *Montana*, a major source of tribal authority over a reservation is found in the "exclusive use" provision or other comparable provision of the applicable treaty. Cf., Treaty of Olympia, Article II, Pet. App. A-78, A-79. To be sure, *Merrion* establishes that this tribal authority is true, albeit diminished, sovereignty, and not just the authority of a landowner. But alienation of reservation lands to non-Indians eliminates that source of tribal authority with respect to persons and transactions on the lands so alienated. *Montana*, 450 U.S. at 560, 561.

The territorial component, in short, can be traced directly back to an application of actual treaty language, as well as to the Allotment Acts.

Before leaving this question, we must again emphasize that it is a question of congressional intent, as mani-

fested in the actual language of a treaty or statute. Indeed, absent federal recognition by a treaty, as here, or a statute, or administrative action authorized by statute, Indian tribes may exist for the anthropologist, but they do not exist as far as federal law is concerned. The point made in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172, that one must avoid "reliance on platonic notion of Indian sovereignty \* \* \*" and "look instead to the applicable treaties and statutes \* \* \*" is critical here. It is equally critical in consideration of the constitutional question.

**C. If Congress Intended That The Retained Sovereignty Of Indian Tribes Should Include The Power To Tax Non-Indians On Non-Indian Lands, The Rights Of Such Non-Indians Under The Fifth Amendment Of The U.S. Constitution Have Thereby Been Violated.**

We add only one comment to the Petitioners' discussion of this question. (Pet., pages 36-39). The requirement that a tribal ordinance be approved by the Secretary of Interior before it becomes effective is quite common. This requirement is sometimes contained in a tribal constitution. See, e.g., *Merrion*, 455 U.S. at 150. And sometimes it is contained in a statute. See, e.g., 18 U.S.C. 1161, and *United States v. Mazurie*, 419 U.S. 544, at 558, n. 12 (1975), where the Court referred to the "\* \* \* protection [for non-members] against arbitrary tribal action \* \* \*" which "\* \* \* is to some extreme assured \* \* \*" by such a requirement. *Mazurie*, *id.*

The existence of a requirement of this sort, however, does not diminish the importance of Fifth Amendment issue, for at least three reasons.

First, such a requirement is far from universal. The Quinault tax ordinance under challenge here, for example, was not subject to secretarial approval under either the Quinault Constitution or any federal statute. Cf. Quinault Constitution, Art. IV, Pet. App. A-111. And similarly the



tribal criminal code involved in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) needed no such approval. See P. 5, Brief for the United States as Amicus Curiae, No. 76-5729, O.T. 1977. Nor, so far as we can ascertain, did the tribal ordinance involved in *United States v. Montana*. See also *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (Secretarial approval not necessary for valid tribal tax upon non-Indian oil and gas producers.)

Secondly, far from alleviating the constitutional problem under the Fifth Amendment, a requirement of secretarial approval actually aggravates it. The Secretary can hardly say to a Tribe: "I approve your doing this", and then be heard to say to this Court: "But that is only a tribal decision, unfettered by the Fifth Amendment, not a federal decision." A more compelling case for applying *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) is difficult to imagine.

Thirdly, secretarial approval cannot make constitutional an assertion of tribal power over non-Indians that would otherwise be unconstitutional. As the Court stated in *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964), in holding that an otherwise unconstitutional apportionment of a state legislature was not saved by the fact that it was adopted by popular referendum:

"A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas*, 377 U.S. at 736, 737.

The result should be the same if the Secretary of Interior makes a similar choice.

**D. The Decision of the Court Below Holding the Indian Civil Rights Act Unenforceable in Federal Courts is in Conflict with a Decision of the Court of Appeals for the Tenth Circuit. Resolution of this Conflict Involves an Important Issue of Federal Law.**

We add only a brief comment to the Petitioner's discussion. (Pet., pages 26-36). While Indian reservations are



located in all parts of the Nation (see Appendix A), the bulk of the litigation involving non-Indians appears to arise in the Eighth, Ninth, and Tenth Circuits, with perhaps the last two predominating. Thus, the conflict between the Ninth and Tenth Circuits arising from the decision below and *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. den.* 49 U.S. 1118 (1981) is especially troublesome, and is likely to become more so unless resolved by this Court. The problem will not simply go away.<sup>9</sup>

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"The problem becomes aggravated by the fact that one cannot usually look to tribal courts for an effective remedy, as strikingly shown by the following discussion of judicial review of tribal decisions found in Pevar, *The Rights of Indians and Tribes, An American Civil Liberties Union Handbook*, Bantam Books, 1983, page 272. Though directed to the problems facing an aggrieved Indian, the discussion is applicable to those of a non-Indian as well.

"To give an example, suppose your tribal council refuses to certify you as a candidate for elective office. Can you sue the tribe in tribal, state or federal court? *Few tribes have given their courts jurisdiction over cases brought against the tribe.* Consequently your lawsuit in tribal court would be dismissed for lack of jurisdiction. The state and federal courts are closed to you too, because Indian tribes have the same 'sovereign immunity' from suit that other governments have, which means they cannot be sued without their permission. *Consequently, although your rights have been violated, there is no court in the country that can help you.*" (Emphasis supplied.)

### Conclusion

In Article IV, § 4 of the United States Constitution, the United States guarantees to every State "a republican form of government." This provision is not, we realize, judicially enforceable. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). But it merits attention here, nevertheless. For this court has defined at least the contours of the concept.

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves. \* \* \*" *Duncan v. McCall*, 139 U.S. 449, at 461 (1891). See also, *The Federalist*, No. 39 (Madison), Cooke, Ed., Meridian Books, 1961, page 250.

As pointed out by Madison, the government of the United States is republican in form because the United States Constitution has made it so; and similarly, the governments of the various states are republican in form because the state constitutions have made them so. The concept has always been absolutely central to all governments in this Nation, from its very beginning.

Tribal government over non-Indians, however, as exemplified by the taxing ordinance involved here, hardly fits within that concept. And it should not be supposed that the Congress has attempted to establish, or even has the power to establish, a form of government so absolutely alien to that concept.

Respectfully submitted,

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## A-1

## APPENDIX A

RESERVATIONS	Total Persons	Total Indians
Acoma Pueblo, N. Mex. ....	2,359	2,268
Agua Caliente Reservation, Calif. ....	13,743	65
Alabama-Coushatta Reservation, Tex. ....	504	494
Alamo Reservation, N. Mex. ....	1,072	1,062
Allegany Reservation, N.Y. ....	7,681	925
Alturas Rancheria, Calif. ....	7	7
Annette Island Reserve, Alaska ....	1,195	958
Augustine Reservation, Calif. ....	—	—
Bad River Reservation, Wis. ....	916	699
Barona Rancheria, Calif. ....	300	222
Bay Mills Reservation, Mich. ....	322	283
Benton Paiute Reservation, Calif. ....	12	12
Berry Creek Rancheria, Calif. ....	—	—
Big Bend Rancheria, Calif. ....	11	8
Big Cypress Reservation, Fla. ....	387	351
Big Lagoon Rancheria, Calif. ....	11	8
Big Pine Rancheria, Calif. ....	396	269
Bishop Rancheria, Calif. ....	1,125	784
Blackfeet Reservation, Mont. ....	6,660	5,080
Bois Forte Reservation (Nett Lake), Minn. ....	416	392
Bridgeport Colony, Calif. ....	55	47
Brighton Reservation, Fla. ....	338	323
Burns Reservation, Oreg. ....	167	160
Cabazon Reservation, Calif. ....	815	8
Cachil Dehe Rancheria, Calif. ....	17	17
Cahuilla Reservation, Calif. ....	56	29
Campo Reservation, Calif. ....	100	86
Camp Verde Reservation, Ariz. ....	200	173
Canoncito Reservation, N. Mex. ....	978	969
Capitan Grande Reservation, Calif. ....	—	—
Carson Colony, Nev. ....	227	213
Catawba Reservation, S.C. ....	998	728
Cattaraugus Reservation, N.Y. ....	1,994	1,855
Cedarville Rancheria, Calif. ....	6	6
Chehalis Reservation, Wash. ....	405	200
Chamehuevi Reservation, Calif. ....	265	23
Cheyenne River Reservation, S. Dak. ....	1,826	1,529
Chitimacha Reservation, La. ....	1,300	185
Cochiti Pueblo, N. Mex. ....	839	613
Cocopah Reservation, Ariz. ....	355	349
Coeur d'Alene Reservation, Idaho ....	4,911	538

RESERVATIONS	Total Persons	Total Indians
Cold Springs Rancheria, Calif. ....	65	63
Colorado River Reservation, Ariz.-Calif. ...	7,873	1,965
Colville Reservation, Wash. ....	7,047	3,500
Cortina Rancheria, Calif. ....	6	2
Coushatta Reservation, La. ....	—	—
Coyote Valley Rancheria, Calif. ....	9	—
Crow Reservation, Mont. ....	5,973	3,953
Crow Creek Reservation, S. Dak. ....	1,787	1,474
Cuyapaipe Reservation, Calif. ....	2	2
Deer Creek Reservation, Minn. ....	219	7
Dresslerville Colony, Nev. ....	129	127
Dry Creek Rancheria, Calif. ....	46	41
Duck Valley Reservation, Idaho-Nev. ....	1,041	932
Duckwater Reservation, Nev. ....	106	103
Eastern Cherokee Reservation, N.C. ....	5,717	4,844
Eastern Pequot Reservation, Conn. ....	29	16
Ely Colony, Nev. ....	78	67
Enterprise Rancheria, Calif. ....	16	16
Fallon Colony, Nev. ....	64	46
Fallon Reservation, Nev. ....	279	258
Flandreau Reservation, S. Dak. ....	169	158
Flathead Reservation, Mont. ....	19,628	3,771
Fond du Lac Reservation, Minn. ....	2,853	514
Fort Apache Reservation, Ariz. ....	7,774	6,880
Fort Belknap Reservation, Mont. ....	2,060	1,870
Fort Berthold Reservation, N. Dak. ....	5,577	2,640
Fort Bidwell Reservation, Calif. ....	98	93
Fort Hall Reservation, Idaho ....	4,783	2,542
Fort Independence Reservation, Calif. ....	61	31
Fort McDermitt Reservation, Nev.-Oreg. ...	472	463
Fort McDowell Reservation, Ariz. ....	349	345
Fort Mojave Reservation, Ariz.-Calif.-Nev..	219	127
Fort Peck Reservation, Mont. ....	9,921	4,273
Fort Totten Reservation, N. Dak. ....	3,313	2,261
Fort Yuma Reservation, Ariz.-Calif. ....	4,581	1,096
Gila Bend Reservation, Ariz. ....	—	—
Gila River Reservation, Ariz. ....	7,380	7,067
Golden Hill Reservation, Conn. ....	3	3
Goshute Reservation, Nev.-Utah. ....	105	105
Grand Portage Reservation, Minn. ....	281	187
Grindstone Creek Rancheria, Calif. ....	73	72
Hannahville Community, Mich. ....	211	206
Hassanamisco Reservation, Mass. ....	1	1

<b>RESERVATIONS</b>	<b>Total Persons</b>	<b>Total Indians</b>
Havasupai Reservation, Ariz. ....	282	267
Hoh Reservation, Wash. ....	67	46
Hollywood Reservation, Fla. ....	2,592	416
Hoopa Valley Reservation, Calif. ....	2,041	1,502
Hoopa Valley Extension Reservation, Calif. ....	1,082	411
Hopi Reservation, Ariz. ....	6,906	6,601
Hopland Rancheria, Calif. ....	13	10
Hualapai Reservation, Ariz. ....	849	809
Inaja-Cosmit Reservation, Calif. ....	—	—
Indian Township Reservation, Maine ....	423	333
Iowa Reservation, Kans.-Nebr. ....	112	26
Isabella Reservation, Mich. ....	23,020	517
Isleta Pueblo, N. Mex. ....	2,412	2,289
Jackson Rancheria, Calif. ....	15	15
Jemez Pubeblo, N. Mex. ....	1,515	1,504
Jicarilla Apache Reservation, N. Mex. ....	1,996	1,715
Kaibab Reservation, Ariz. ....	173	93
Kalispel Reservation, Wash. ....	106	98
Kickapoo Reservation, Kans. ....	461	356
Kootenai Reservation, Idaho ....	—	—
Lac Courte Oreilles Reservation, Wis. ....	1,699	1,145
Lac du Flambeau Reservation, Wis. ....	2,211	1,092
Laguna Pueblo, N. Mex. ....	3,791	3,564
La Jolla Reservation, Calif. ....	151	141
L'Anse Reservation, Mich. ....	3,289	581
La Posta Reservation, Calif. ....	1	1
Las Vegas Colony, Nev. ....	113	106
Laytonville Rancheria, Calif. ....	111	105
Leech Lake Reservation, Minn. ....	8,411	2,759
Likely Rancheria, Calif. ....	—	—
Lone Pine Rancheria, Calif. ....	248	172
Lookout Rancheria, Calif. ....	13	12
Los Coyotes Reservation, Calif. ....	51	45
Lovelock Colony, Nev. ....	126	117
Lower Brule Reservation, S. Dak. ....	1,023	850
Lower Elwah Reservation, Wash. ....	67	47
Lower Sioux Community, Minn. ....	79	65
Lummi Reservation, Wash. ....	2,274	1,259
Makah Reservation, Wash. ....	1,245	803
Manchester Rancheria, Calif. ....	81	77
Manzanita Reservation, Calif. ....	14	13
Maricopa Reservation, Ariz. ....	397	375
Menominee Reservation, Wis. ....	2,672	2,377

RESERVATIONS	Total Persons	Total Indians
Mesa Grande Reservation, Calif. ....	—	—
Mescalero Apache Reservation, N. Mex. . .	2,101	1,922
Miccosukee Reservation, Fla. ....	276	1
Middletown Rancheria, Calif. ....	40	39
Mille Lacs Reservation, Minn. ....	37	36
Mississippi Choctaw Reservation ....	2,866	2,756
Moapa River Reservation, Nev. ....	185	182
Montgomery Creek Rancheria, Calif. ....	1	1
Morango Reservation, Calif. ....	414	313
Muckleshoot Reservation, Wash. ....	2,991	375
Nambe Pueblo, N. Mex. ....	386	175
Navajo Reservation, Ariz.-N. Mex.-Utah . .	110,433	104,968
Nez Perce Reservation, Idaho ....	17,806	1,463
Nisqually Reservation, Wash. ....	254	42
Nooksack Reservation, Wash. ....	—	—
Northern Cheyenne Reservation, Mont. . .	3,664	3,101
Oil Springs Reservation, N.Y. ....	6	—
Omaha Reservation, Iowa-Nebr. ....	5,459	1,275
Oneida Reservation, Wis. ....	13,389	1,821
Onondaga Reservation, N.Y. ....	596	592
Ontonagon Reservation, Mich. ....	—	—
Osage Reservation, Okla. ....	39,327	4,749
Ozette Reservation, Wash. ....	6	1
Pala Reservation, Calif. ....	648	519
Pamunkey Reservation, Va. ....	59	50
Papago Reservation, Ariz. ....	7,203	6,959
Pascua Yaqui Reservation, Ariz. ....	562	551
Pauma Reservation, Calif. ....	—	—
Payson Community of Yavapai-Apache, Ariz.	—	—
Pechanga Reservation, Calif. ....	141	117
Penobscot Reservation, Maine ....	458	398
Picuris Pueblo, N. Mex. ....	337	116
Pine Creek Reservation, Mich. ....	—	—
Pine Ridge Reservation, S. Dak. ....	13,143	11,882
Pleasant Point Reservation, Maine ....	549	504
Pojoaque Pueblo, N. Mex. ....	1,191	94
Poospatuck Reservation, N.Y. ....	203	94
Port Gamble Reservation, Wash. ....	302	266
Port Madison Reservation, Wash. ....	3,415	148
Patawatomi Reservation, Wis. ....	224	220
Pottawatomi Reservation, Kans. ....	985	331
Prairie Island Community, Minn. ....	111	80
Puyallup Reservation, Wash. ....	25,188	856

RESERVATIONS	Total Persons	Total Indians
Pyramid Lake Reservation, Nev. ....	853	720
Quileute Reservation, Wash. ....	327	273
Quinault Reservation, Wash. ....	1,501	943
Ramah Community, N. Mex. ....	1,237	1,163
Ramona Reservation, Calif. ....	—	—
Red Cliff Reservation, Wis. ....	686	589
Red Lake Reservation, Minn. ....	2,979	2,823
Reno-Sparks Colony, Nev. ....	463	451
Resighini Rancheria, Calif. ....	21	18
Rincon Reservation, Calif. ....	490	297
Roaring Creek Rancheria, Calif. ....	25	24
Rocky Boy's Reservation, Mont. ....	1,650	1,549
Rosebud Reservation, S. Dak. ....	7,328	5,688
Round Valley Reservation, Calif. ....	1,268	528
Rumsey Rancheria, Calif. ....	13	11
Sac and Fox Reservation, Iowa ....	509	492
Sac and Fox Reservation, Kans.-Nebr. ....	114	3
St. Croix Reservation, Wis. ....	427	392
St. Regis Mohawk Reservation, N.Y. ....	1,802	1,763
Salt River Reservation, Ariz. ....	4,089	2,624
San Carlos Reservation, Ariz. ....	6,104	5,872
Sandia Pueblo, N. Mex. ....	683	217
Sandy Lake Reservation, Minn. ....	—	—
San Felipe Pueblo, N. Mex. ....	2,266	1,789
San Ildefonso Pueblo, N. Mex. ....	1,491	488
San Juan Pueblo, N. Mex. ....	4,365	852
San Manuel Reservation, Calif. ....	31	24
San Pasqual Reservation, Calif. ....	209	133
Santa Ana Pueblo, N. Mex. ....	409	407
Santa Clara Pueblo, N. Mex. ....	6,740	459
Santa Rosa Rancheria, Calif. ....	169	117
Santa Rosa Reservation, Calif. ....	12	12
Santa Ynez Reservation, Calif. ....	133	—
Santa Ysabel Reservation, Calif. ....	196	181
Santee Reservation, Nebr. ....	914	420
Santo Domingo Pueblo, N. Mex. ....	2,162	2,139
San Xavier Reservation, Ariz. ....	875	851
Sauk-Suiattle Reservation, Wash. ....	—	—
Sault Ste. Marie Reservation, Mich. ....	—	—
Schaghticoke Reservation, Conn. ....	6	2
Shakopee Community, Minn. ....	106	77
Sheep Ranch Rancheria, Calif. ....	2	2
Sherwood Valley Rancheria, Calif. ....	19	17

RESERVATIONS	Total Persons	Total Indians
Shingle Springs Rancheria, Calif. ....	—	—
Shinnecock Reservation, N.Y. ....	297	194
Shoalwater Reservation, Wash. ....	33	28
Sisseton Reservation, N. Dak.-S. Dak. ....	13,586	2,700
Skokomish Reservation, Wash. ....	483	305
Skull Valley Reservation, Utah. ....	13	13
Soboba Reservation, Calif. ....	258	230
Sokaogon Chippewa Community, Wis. ....	105	95
Southern Paiute Reservation, Utah. ....	1,217	196
Southern Ute Reservation, Colo. ....	5,739	855
Spokane Reservation, Wash. ....	1,475	1,050
Squaxin Island Reservation, Wash. ....	56	35
Standing Rock Reservation, N. Dak.-S. Dak. ....	8,816	4,800
Stewart's Point Rancheria, Calif. ....	75	72
Stockbridge Reservation, Wis. ....	1,272	582
Sulphur Bank Rancheria, Calif. ....	115	115
Summit Lake Reservation, Nev. ....	—	—
Susanville Reservation, Calif. ....	90	82
Swinomish Reservation, Wash. ....	1,390	414
Sycuan Reservation, Calif. ....	61	48
Tama Reservation, Ga. ....	33	30
Taos Pueblo, N. Mex. ....	1,421	716
Te-Moak Reservation, Nev. ....	91	91
Tesuque Pueblo, N. Mex. ....	252	235
Tigua Reservation, Tex. ....	503	—
Tonawanda Reservation, N.Y. ....	467	438
Torres-Martinez Reservation, Calif. ....	278	11
Trinidad Rancheria, Calif. ....	63	47
Tulalip Reservation, Wash. ....	5,046	768
Tule River Reservation, Calif. ....	453	424
Tunica-Biloxi Reservation, La. ....	63	7
Tuolumne Rancheria, Calif. ....	93	73
Turtle Mountain Reservation, N. Dak. ....	4,311	4,021
Tuscarora Reservation, N.Y. ....	921	873
Twenty-Nine Palms Reservation, Calif. ....	—	—
Uintah and Ouray Reservation, Utah. ....	16,909	2,050
Umatilla Reservation, Oreg. ....	2,619	908
Upper Sioux Community, Minn. ....	54	51
Upper Skagit Reservation, Wash. ....	5	—
Ute Mountain Reservation, Colo.-N. Mex. ....	1,138	1,111
Vermillion Lake Reservation, Minn. ....	116	103
Viejas Rancheria, Calif. ....	209	142
Walker River Reservation, Nev. ....	571	471



RESERVATIONS	Total Persons	Total Indians
Wampanoog Reservation, Mass. ....	—	—
Warm Springs Reservation, Oreg. ....	2,244	2,004
Washoe Reservation, Nev. ....	87	4
Western Pequot Reservation, Conn. ....	24	6
White Earth Reservation, Minn. ....	9,505	2,554
Wind River Reservation, Wyo. ....	23,157	4,150
Winnebago Reservation, Nebr. ....	2,554	1,140
Winnemucca Colony, Nev. ....	37	35
Wisconsin Winnebago Reservation ....	658	579
Woodfords Community, Calif. ....	308	126
XL Ranch Reservation, Calif. ....	24	24
Yakima Reservation, Wash. ....	25,363	4,983
Yankton Reservation, S. Dak. ....	6,541	1,688
Yavapai Reservation, Ariz. ....	76	66
Yerington Reservation, Nev. ....	421	105
Yomba Reservation, Nev. ....	60	57
Zia Pueblo, N. Mex. ....	524	524
Zuni Pueblo, N. Mex. ....	6,291	5,988
San Felipe/Santa Ana Joint Area, N. Mex.	—	—
San Felipe/Santo Domingo Joint Area, N. Mex. ....	122	116
Other reservation lands in Montana ....	8	1

No. 83-595

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MAY 2 1983

ALEXANDER L. STEVENS

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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KENNETH R. SNOW, ET AL., PETITIONERS

v.

QUINAULT INDIAN NATION, ETC., ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTIONS PRESENTED

1. Whether a non-Indian engaged in business on fee land on the Quinault Indian Reservation is absolutely immune from paying a reasonable business tax adopted by the Quinault Indian Nation and made applicable to persons engaged in business within the Reservation.

2. Whether petitioners have an implied right of action under the Indian Civil Rights Act, 25 U.S.C. 1302(8), against the Quinault Nation and its officers to challenge the application of the tax to their businesses even though they did not exhaust the remedies afforded by the Quinault Nation to challenge the application of the tax.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

---

## **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

This brief is filed in response to the Court's invitation.

### **STATEMENT**

1. In the Treaty of Olympia (12 Stat. 971 *et seq.*), the Quinault and Quileute Tribes ceded to the United States a vast tract of land on the Olympic Peninsula in the State of Washington. In return, the United States agreed to set aside a reservation for "exclusive use" of the Indians and stipulated that "no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent." Art. II, 12 Stat. 971. On November 4, 1873, President Grant issued an Executive Order designating approximately 200,000 acres along the Washington coast as the Reservation promised under the Treaty. Most of the land was heavily forested. Beginning in 1905, the federal government began to grant allotments of land on the Quinault Reservation in trust to individual Indians pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat.

388, 25 U.S.C. 311 *et seq.* By 1935, the entire Reservation had been divided into 2,340 trust allotments. Approximately one-third of the Reservation land has since gone out of trust; the remaining two-thirds have remained in trust status. See generally *United States v. Mitchell*, No. 81-1748 (June 27, 1983), slip op. 1-3. Most of the non-trust lands are owned by timber companies (Pet. App. A17). More than 95% of the jobs and dollar volume of economic activity on the Reservation is generated by wood harvesting and processing (*ibid.*). According to the Tribe (Br. in Opp. 8), at the present time, Indians comprise approximately two-thirds of the population of the Reservation.

The forest resources on allotted lands long have been managed by the Department of the Interior (*United States v. Mitchell*, slip op. 3), and the Tribe and its members maintain approximately 800 miles of forest roads to provide access to much of the Reservation's forested interior (Affidavit of Warren Shale 2; Br. in Opp. 13). In addition, the Quinault Department of Natural Resources and Economic Development provides a fire watch and equipment and personnel to fight forest fires on both fee and trust lands and exercises regulatory control over forest practices that can damage timber and fish resources. The tribal police department also protects against theft of timber on fee and trust lands. Pet. App. A17-A18.

The unincorporated Village of Amanda Park, where the petitioners in this case are engaged in business, is a tourist community adjacent to Lake Quinault. Both the village and the Lake are situated entirely within the Quinault Reservation, and the bed and banks of the Lake have been held to belong to the Tribe. *United States v. Washington*, 694 F.2d 188 (9th Cir. 1982), cert. denied, No. 82-1507 (June 27, 1983). The Tribe manages the Lake to preserve its natural beauty and serenity and to provide recreational opportunities for Indians and non-Indians. Consistent with these objectives, the Tribe reg-

ulates fishing and boating on the Lake by both Indians and non-Indians. Pet. App. A18-A19. The district court's opinion indicates that the Tribe also furnishes other services on the Reservation, including police and fire protection and ambulance, television relay, building inspection, and social services. With the exception of certain social programs, these services apparently are available without regard to whether the recipient is an Indian or a non-Indian and without regard to whether the land on which the services are rendered is in trust or fee status. Pet. App. A18.

For some years, the Quinault Tribe has had a Business License Ordinance (Quinault Tribal Code Tit. 40 (1961); Pet. App. A112-A121) that requires the annual payment of a \$5.00 license fee by persons engaged in business within the Reservation (Quinault Tribal Code § 40.05; Pet. App. A116). In 1977, the Quinault Business Committee passed a resolution adopting rules under the Business License Ordinance that also impose a tax on persons engaged in business on the Reservation (Pet. App. A122-A142). The tax is imposed at a fixed rate (generally \$25, \$50 or \$100, depending upon the type of business), multiplied by the number of employees in the business. Thus, for example, a person engaged in the business of harvesting green timber (for which the applicable tax rate is \$50 per employee (*id.* at A127)) who employed two employees in his operation would pay an annual tax of \$100. In order to encourage the employment of Indians, however, the tax rate is reduced by one-half as applied to any employee who is an enrolled tribal member (*id.* at A136).

2. a. This action was filed on July 26, 1977, in the United States District Court for the Western District of Washington by petitioners and others to challenge the application to their businesses of the Tribe's business tax. The three petitioners are non-Indians who own and operate businesses on fee land in Amanda Park, adjacent to Lake Quinault. Petitioner Snow operates a general store; petitioner Hull operates a cafe and tavern; and petitioner



Sansom operates a service station. Pet. 6.<sup>1</sup> Snow sells tribal fishing permits at his general store (Pet. App. A19), and Sansom sells outboard motors and fishing tackle at his service station (Affidavit of Guy Sansom 2).

Because the suit was filed before the August 1, 1977 effective date of the business tax (Pet. App. A122), petitioners had not then paid any tax, and we have been informed by counsel for the Tribe that petitioners still have not done so. We have been further informed that, although the tax provisions adopted in 1977 authorize the Quinault Department of Revenue to determine and assess the amount of the tax due if the taxpayer does not file a return and pay the tax as required by tribal law (Rule 3.40(6) and (7); Pet. App. A139-A141), the Department of Revenue did not pursue these steps for any tax from 1977 to the present because of the pendency of this suit.

In addition, in 1979, the Tribe adopted a procedure by which a taxpayer may challenge the tax. See Quinault Tax Refund Act, codified at Tit. 40A of the Quinault Tribal Code (1961). Under the Quinault Tax Refund Act, a taxpayer who has paid the tax may, within 90 days, bring an action for refund in Tribal Court against the Quinault Department of Revenue. The Tribal Court may determine "any factual or legal issue affecting the payment of such tax," and "[p]ayment of the challenged tax is a condition precedent to the right of review of any issue of fact or law affecting taxes imposed by the Quinault Indian Nation." Quinault Tribal Code §§ 40 A.01.030, 40 A.01.060 (1961). There is no indication that petitioners have availed themselves of this procedure to challenge the validity of the business tax as applied to them, and indeed that remedy is unavailable if, as appears, they have not first paid the tax and then requested a refund.

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<sup>1</sup> A number of other individuals joined the three petitioners as plaintiffs in district court and as appellants in the court of appeals (Pet. App. A1; Br. in Opp. 5 n.), but they have not sought review in this Court.

Because petitioners have never paid a tax to the Tribe and the Tribe has never assessed a tax against them, the record does not definitively establish the amount of tax petitioners would owe under the Tribal Code. However, an affidavit dated August 17, 1978 filed by petitioner Snow in district court stated that his general store employed five individuals, all of who are non-Indians. Based on this information, Snow would be liable for a tax of \$250, computed by using the base rate of \$50 per employee for the business of the retail sale of tangible personal property (see Rule 2.40(5)(a); Pet. App. A129-A130). In addition, Snow's affidavit stated that he would owe a tax of \$100 for engaging in the business of rental or lease of real property (see Rule 2.40(6)(ll); Pet. App. A136). By way of comparison, Snow stated in his affidavit that he paid to the State or County all sales taxes payable on items sold in his retail store, as well as approximately \$1,760 in real and personal property taxes on his store and rental houses, a business and occupation tax of \$630, and a master license tax of \$96.

Petitioner Sansom filed an affidavit dated August 18, 1978 stating that he employed two individuals, including himself, at his service station in Amanda Park. The base tax rate for a service station is \$25 per employee (Rule 2.40(5)(m); Pet. App. A131), which would indicate that Sansom would owe the Tribe a total amount of \$50, although there is some dispute regarding the amount of tax he would actually owe.<sup>2</sup> By way of comparison, Sansom

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<sup>2</sup> Sansom speculated in his affidavit that he would be separately liable for a tax on each of certain ancillary features of his service station business—such as a storage garage business, automotive towing, operation of vending machines, auto and truck repair, and making sales at retail—which could increase his total tax liability to \$500. However, an affidavit filed by Leda Williams, the Acting Revenue Clerk of the Tribe, stated that Sansom appeared to have overstated his tax liability and that he was entitled to consult with her office to determine his tax liability. There is no indication that he did so. Similarly, the Tribe states in its Brief in Opposition (at 21 n.) that Sansom may owe an annual tax of only \$50 or \$100.

stated in his affidavit that he paid an unspecified amount of sales taxes to the State of Washington and \$740 in county property taxes. The record does not disclose petitioner Hull's tax liability under tribal or state law.

b. On September 29, 1980, the district court granted summary judgment for respondents (Pet. App. A13-A24). The court first noted that the Tribe had raised the defense of sovereign immunity, but it declined to reach that question because plaintiffs also had joined the Tribe's Revenue Clerk, over whom it found jurisdiction (Pet. App. A15).

On the merits, the district court sustained the validity of the tax. It observed that the Tribe had recognized "the need to establish a reliable revenue base for the delivery of government services and to reduce dependence on unreliable federal funding" and that "[s]uch efforts must focus on commerce generated by the Reservation's resources." Pet. App. A20. The court also stressed that the question was not whether the plaintiffs paid taxes to and received services from the State and County, as petitioner Snow claimed, but instead whether the Tribe also could impose a tax on the plaintiffs. In holding that the Tribe could do so, the court explained that "[t]he record establishes that the Plaintiffs do business within the Quinault Reservation and that the tribal government provides services which are available and of benefit to Plaintiffs and others doing business within the Reservation's boundaries." *Id.* at A21 (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-446 (1940)).

The district court found its holding reinforced by the then-recent decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 147 (1980) (Pet. App. A22). The court rejected the contention that *Colville* should be read to recognize tribal taxing authority only with respect to transactions on trust land, observing that "the authorities relied upon by the Court in *Colville* themselves dealt with tribal civil jurisdiction, in some cases taxing jurisdiction, on both fee and trust land" (Pet. App. A22-A23).

Finally, the district court held that it did not have jurisdiction over the plaintiffs' contention that the tribal tax is discriminatory in violation of the Indian Civil Rights Act (25 U.S.C. 1302(8)) because of the lower rate as applied to employees who are tribal members. The court held that "[t]he tribal forum for the adjudication of such claims is exclusive both for Indians and non-Indians." Pet. App. A23 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

c. The court of appeals affirmed the district court's award of summary judgment in favor of the respondents (Pet. App. A1-A12). It held that under this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, the Tribe itself is immune from suit (Pet. App. A5). The court further held that the instant action was barred as against the Tribe's Revenue Clerk unless her actions in administering the Ordinance were outside the scope of the Tribe's sovereign powers (*ibid.*). The court concluded that they were not. In the court of appeals' view, the case was governed by this Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which sustained a tribal severance tax as applied to non-Indians. Especially significant, the court below believed, was this Court's approval in *Merrion of Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906), which upheld such a tax even as applied to businesses on sites in an incorporated town that had been patented to non-Indians. The court concluded that application of the Quinault Tribe's tax to non-Indians engaged in business within the Reservation is a valid exercise of the Tribe's inherent sovereign power to raise revenue to support tribal governmental services. Pet. App. A6-A7.

The court of appeals also held that under this Court's decision in *Santa Clara Pueblo v. Martinez*, *supra*, petitioners do not have a cause of action in federal court against the Tribe or its officers under the Indian Civil Rights Act (ICRA) for an alleged denial of equal protection because a lower tax rate is applicable in the case

of employees who are tribal members (Pet. App. A10-A11). The court explained that Snow "has not submitted his ICRA denial of equal protection claim to the Quinault tribal court" and that "[h]e cannot now avoid the tribal court by claiming that the district court properly has jurisdiction over this ICRA claim" (Pet. App. A11).

### DISCUSSION

The decision of the court of appeals sustaining the authority of the Quinault Tribe to apply its modest business tax to non-Indians and holding that no cause of action lies against the Tribe or its officers under the Indian Civil Rights Act in the circumstances of this case is correct and does not conflict with any decision of this Court or any court of appeals. Review by this Court therefore is not warranted.

1. a. The court of appeals was plainly correct in concluding that an Indian Tribe is not wholly barred from applying a reasonable tax to the commercial activities of a non-Indian engaged in business on the Reservation simply because the non-Indian's business happens to be conducted on fee land. To be sure, some activities of non-Indians on fee land within a reservation are not subject to tribal jurisdiction. This is true, for example, with regard to largely private conduct by a non-Indian that can be viewed as a normal incident of his ownership of the fee to the land, such as the hunting and fishing at issue in *Montana v. United States*, 450 U.S. 544 (1981)—at least where the non-Indian's conduct has no impact on the legal rights, political integrity, economic security, or health or welfare of the Tribe or its members and is unrelated to any dealings between the non-Indian and the Tribe or its members. See *id.* at 558 n.6, 565-566. In such a case, the allotment of land within a Reservation pursuant to the General Allotment Act of 1887 and the eventual passage of fee title to a non-Indian can be thought to confer a right on the non-Indian to conduct his own private affairs on the tract he has acquired. Cf. 450 U.S. at 559-560 n.9. But the alienation of Reservation land does not

wholly exempt the new owner from otherwise governing Reservation law.

As the Court recognized in *Montana* itself (450 U.S. at 565-566), the passage of title to a non-Indian does not render an allotted parcel an enclave that is insulated for *all* purposes from the broader Reservation community of which the parcel remains a part. See also *New Mexico v. Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 7 n.12; *Solem v. Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 4 ("Federal, State, and Tribal authorities share jurisdiction over [opened] lands if the relevant surplus land act did not diminish the existing Indian reservation."). Indeed, as the Court stressed in *Solem v. Bartlett*, slip op. 4, Congress itself has explicitly declared *all* lands within a reservation, including land owned in fee by non-Indians, to be "Indian country" (18 U.S.C. 1151(a)), thereby confirming by legislation that land owned in fee by non-Indians does not for that reason lose its relationship to the reservation community or to the tribal government responsible for maintaining the welfare of that community.<sup>3</sup> This is especially so where, as here, the non-Indian is not devot-

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<sup>3</sup> In *Solem v. Bartlett*, *supra*, the Court unanimously held that a surplus land act opening a portion of a reservation for immediate disposition directly to non-Indians will not be construed to have terminated the reservation status of the opened portion in the absence of "substantial and compelling evidence" of congressional intent to that effect (slip op. 9). It follows from the decision in *Solem v. Bartlett* that the Tribe likewise retains an interest in conduct on non-Indian land within the reservation where, as here, the passage of land into non-Indian hands was not the result of the implementation of a congressional policy embodied in a surplus land act that contemplated a rather abrupt and broad disposition of land to non-Indians, but rather was the incidental, gradual, and random consequence of a general allotment policy that since has been formally abandoned by Congress itself in the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. 461 *et seq.* That is particularly true here, given the subsequent history of the Quinault Reservation, on which two-thirds of the acreage remains in trust status and Indians comprise two-thirds of the population. Compare *Solem v. Bartlett*, slip op. 8, 16-17.

ing his land to an essentially private use, but instead is engaging in a public commercial enterprise that entails the opening of his premises to the public generally. The General Allotment Act cannot be thought to confer on the non-Indian, as an incident to his mere ownership of the land, an implied (yet absolute) immunity from complying with reasonable measures adopted by Tribe in such circumstances.

Of course, the State also may have a legitimate interest in the on-reservation conduct of the non-Indian and matters affecting his land. But this does not cancel the Tribe's interest. To the contrary, in some instances (such as land use by a non-Indian that may have a substantial impact on adjacent Indian land and resources), the Tribe's interest may far exceed that of the State. The task, then, is to accommodate the legitimate interests of the Tribe and the State. This Court has specifically recognized these principles in the area of taxation of a non-Indian's activities on an Indian reservation, stressing that "different sovereigns can enjoy powers to tax the same transactions" and that "the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 151 (1982). See also *Colville*, *supra*, 447 U.S. at 156-158. The Ninth Circuit's decision in this case accomplishes such an accommodation of state and tribal interests. It does not affect the power of the State or County to levy taxes on petitioners' businesses to support the governmental services that they assertedly furnish to petitioners and others. The decision below simply recognizes that the Tribe has a parallel interest in levying taxes to support the governmental services it furnishes and sustains a tribal tax that is far more limited in amount than the applicable county and state taxes.

b. This Court's precedents firmly support the authority of the Tribe to impose a tax on the conduct of non-Indians on fee land. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Court sustained the application of a tax by the Chickasaw Nation on non-Indians who were graz-



ing their cattle on Indian land. In so holding, however, the Court cited with approval two opinions of the Attorney General that explicitly recognized the authority of the Tribe to impose a tax on non-Indians' activities on land owned by non-Indians. 194 U.S. at 391-392. In the first opinion, the Attorney General explained that "even if the Indian title to the particular lots sold had been extinguished, \* \* \* the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation \* \* \* . The United States might sell lands which it holds in a State, but it would be a strange contention that this gave the purchaser any immunity from local laws or local taxation." 23 Op. Att'y Gen. 214, 217 (1900). The Attorney General reiterated this position in the second opinion cited in *Morris v. Hitchcock*, *supra* (23 Op. Att'y Gen. 528, 530 (1901)), and indeed this Court noted, with apparent approval, the Attorney General's conclusion that the tax on the exportation of hay by non-Indians would be valid "even if the shipper was the absolute owner of the land on which the hay was raised." 194 U.S. at 392.

More recently, the Court repeatedly has confirmed that a Tribe's sovereign power—and particularly its power to tax—extends in some measure to the activities of non-Indians even on fee land. This view is reflected generally, of course, in the Court's oft-quoted observation that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States v. Mazurie*, 419 U.S. 544, 557 (1975), quoted in *New Mexico v. Mescalero Apache Tribe*, slip op. 8; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 140; and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). The reference in *Mazurie* (and thus in the latter cases as well) to the Tribe's "territory" was not limited to only those parcels of land on a reservation that are owned by or held in trust for the Tribe or individual members, since *Mazurie* itself involved the conduct of non-Indians on land owned in fee by a non-Indian.



Moreover, in *Colville*, the Court specifically sustained the Tribes' power to impose a tax on the on-reservation sale of cigarettes to non-Indians, even though the State also imposed a tax on the transactions. As the district court recognized in the instant case (Pet. App. A22-A23), although the particular transactions in *Colville* took place on trust lands, the authorities relied upon by the Court in sustaining the tax were not so limited. The Court cited (447 U.S. at 153) the 1900 Opinion of the Attorney General discussed above (23 Op. Att'y Gen. 214), as well as the comprehensive 1934 opinion of the Solicitor of the Interior concerning the power of Indian Tribes that stated that "[c]hief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation"—a power which was viewed as extending, without regard to ownership of the land, to "nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions" (55 Interior Dec. 14, 46 (1934)). In addition, in observing that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" (447 U.S. at 153), the Court in *Colville* relied upon *Morris v. Hitchcock*, *supra*, which (as we have said) expressed approval of Attorney General opinions that the application of such taxes even to activities on non-Indian land, as well as *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906), which explicitly sustained such a tax. ENDORSED

Similarly, in *Montana v. United States*, *supra*, upon which petitioners principally rely, the Court—even as it struck down a tribal prohibition against hunting and fishing by non-Indians on land owned in fee by non-Indians—stressed that Indian Tribes do "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," and that a Tribe therefore may regulate through taxation and other means the activities of nonmembers

who enter consensual relationships with the Tribe or its members, through commercial dealings or otherwise. 450 U.S. at 565.<sup>4</sup> Since petitioners are engaged in commercial dealings with the public at large on the Reservation and thus have opened their premises to Indians and non-Indians alike, they, like the non-Indians engaged in business in *Buster v. Wright*, *supra*, are subject to taxation by the Tribe under the principles reaffirmed in *Montana*. Moreover, petitioner Snow sells tribal fishing licenses and apparently maintains an account for the Tribe at his store, and thus has entered into a specific relationship with the Tribe beyond the course of his general commercial dealings. The Court in *Montana* also stated that a Tribe retains inherent civil authority over other conduct of non-Indians on fee lands within the Reservation that threatens or has a direct effect on the political integrity, economic security, or health or welfare of the Tribe. 450 U.S. at 566. The commercial dealings of the non-Indian businessmen in this case—in a tourist community adjacent to a Lake owned and maintained by the Tribe—establishes a sufficient nexus to tribal interests to sustain the exercise of civil authority by the Tribe under this aspect of the *Montana* rationale as well.<sup>5</sup>

Finally, this Court's decision in *Merrion v. Jicarilla Apache Tribe*, *supra*, also firmly supports application of the Quinault Nation's tax ordinance to activities of non-Indians on fee lands. Although the specific tax in *Merrion* pertained to extraction of minerals on land held for the

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<sup>4</sup> Once again, the Court cited *Morris v. Hitchcock*, *supra*, and *Buster v. Wright*, *supra*, for this proposition, thereby making clear that the result in *Montana* itself with respect to hunting and fishing by non-Indians that did not affect Indian interests did not disturb the long-recognized principle of Indian law that Indian Tribes have inherent authority to impose taxes on non-Indians.

<sup>5</sup> Petitioner Sansom, for example, sells fishing tackle and outboard motors that presumably would be useful on Lake Quinault or other waters of the Reservation that were reserved to the Tribe for fishery purposes. See *Montana v. United States*, 450 U.S. at 566 n.15.

Tribe's benefit, the Court's rationale was not so limited, just as it was not in *Colville*. The Court stressed in *Merrion* that the power of a Tribe to tax non-Indians does not derive from its power to exclude non-Indians from the reservation. "Instead," the Court held, "it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the costs of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137. And with particular relevance to petitioners' claim of exemption in this case, the Court stressed that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens of foreigners." 455 U.S. at 143 (emphasis added by this Court) (quoting *Buster v. Wright*, 135 F. at 952). Thus, the mere fact that the petitioners in this case are engaged in business on land owned by non-Indians, and thus presumably could not be excluded from the Reservation, does not support the recognition of an implied immunity from tribal taxation of their commercial activities.

c. Strong policies recognized by the Court in *Merrion* support this result as well. Petitioners, like the petitioners in *Merrion*, "avail themselves of the 'substantial privilege of carrying on business' on the reservation," and "[t]hey benefit from the provision of police protection and other governmental services, as well as from 'the advantages of a civilized society'" that are assured by the existence of tribal government." 450 U.S. at 137-138 (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437 (1980), and *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980)). The Tribe's law enforcement activities maintain law and order in the reservation community generally, and indeed *only* the Tribe would have jurisdiction to prosecute Indians who

commit non-major crimes even on petitioners' premises. The Tribe no doubt affords the "advantages of a civilized society" through its tribal government in other ways as well, such as in the administration of its Tribal Court, which presumably is open to suits by non-Indians. It may be that the tribal police have not actually had occasion to respond to a call at petitioners' premises and that petitioners have not had a need to sue in Tribal Court, but petitioners did not dispute the Tribe's submission that these and other services at least are available to them. Under established principles of taxation, the fact that an individual has not actually availed himself of a particular governmental service or program that his tax payments support does not ordinarily excuse him from his obligation to defray the expenses of the government generally (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)), and there is no reason for a different result with respect to a tax imposed by an Indian Tribe.

Other activities of the Tribe also presumably benefit petitioners. The maintenance of roads and fire protection for the forested expanses of the Reservation serve to protect the Reservation's dominant resource and economic activity, which in turn benefit to some degree everyone who resides or does business on the Reservation. If timber activities and resulting employment ceased, for example, petitioners' businesses almost surely would be adversely affected. And more directly, the Tribe maintains Lake Quinault and regulates fishing and boating activities on it, thereby benefiting the tourist trade in the Lake Quinault area, to which petitioners assertedly cater.

Thus, the Tribe's tax in this case would appear to be fully consistent with the Court's holding in *Merrion* that "Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services." 455 U.S. at 140. There is no occasion in this case to consider what the outer limits of a Tribe's authority to impose a tax might be, because petitioners have not challenged the *amount* of the tax they owe if, as we have shown, they are not absolutely immune

from imposition of any tax. Moreover, the record in this case does not firmly establish the amount of tax petitioners would owe—although whatever its precise amount, the tax seems quite modest in amount and therefore well within the Tribe's power.

d. As the foregoing discussion establishes, petitioners' contention that they are wholly immune from the Tribe's tax solely by virtue of the fact that their businesses are conducted on fee lands is inconsistent with the fabric of Indian law recognized in this Court's decisions. Petitioners also point to no decisions of other courts of appeals that conflict with the decision below. There accordingly is no reason for the Court to grant review.

We note as well that petitioners have never paid a tax to the Tribe or sought to establish before the Tribe's Department of Revenue or in Tribal Court the amount of their liability or their entitlement to an exemption from taxation based on an assertedly insufficient nexus with tribal affairs. In our view, where, as here, a Tribe has established an adequate mechanism for review of such questions, in a suit for a refund or otherwise, the non-Indian taxpayer should be required to utilize that mechanism before bringing an action in federal court to enjoin administration of the tribal tax. Cf. *South Carolina v. Regan*, No. 94, Orig. (Feb. 22, 1984), slip op. 4-13. Such a result would respect the principles of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and *Williams v. Lee*, 358 U.S. 217 (1959), which recognize the administration of tribal courts as an important feature of tribal sovereignty and self-government and as a suitable means for resolution of disputes involving non-Indians. Exhaustion of tribal remedies also would afford the Tribal Court an opportunity to apply its own law, determine the amount of tax actually owed, and perhaps give the tax provision a narrow construction in order to avoid any difficulties that might be raised by its application to a particular non-Indian who claims to have an insufficient nexus to the Tribe to support imposition of the tax, in whole or in part.

The limited and somewhat opaque nature of the record in federal district court in this case may be partially attributable to petitioners' failure to sharpen the issues through resort to tribal processes. We note, for example, that the Tribe and petitioners disagree regarding the amount of the tax petitioner Sansom actually would owe and that the record does not contain any evidence on the activities or potential liability of petitioner Hull. And even with respect to petitioner Snow, there has been no formal finding by the Tribe's Department of Revenue or the Tribal Court of the amount of the tax he would owe or the justifications for the assessment. Accordingly, even if the Court were otherwise disposed to grant review in a case raising the question of a Tribe's authority to tax non-Indians, this would not be an especially suitable vehicle for that undertaking.

2. Petitioners contend (Pet. 26-36) that the court of appeals erred in holding that the district court did not have jurisdiction over their claim arising under the Indian Civil Rights Act, 25 U.S.C. 1302(8). See Pet. App. A9-A11. Their substantive claim is that the Tribal tax deprives them of their right to equal protection of the laws under the ICRA because the rate applicable to employees who are tribal members is lower than it is for other employees. See Pet. 31. The court of appeals correctly concluded, however, that under this Court's decision in *Santa Clara Pueblo v. Martinez*, *supra*, petitioners have no cause of action under the ICRA against the Tribe or its Revenue Clerk in the circumstances of this case, especially since they have not pursued available remedies in Tribal Court.

In *Martinez*, the Court held that the Tribe itself was immune from suit for an alleged denial of equal protection in violation of the ICRA (436 U.S. at 58-59). That holding plainly bars petitioners' suit against the Quinault Nation here. The Court in *Martinez* concluded that the Tribe's immunity did not extend to the tribal official who also was sued in that case (436 U.S. at 59), but it held that the suit against the tribal official nevertheless had to



be dismissed because there is no implied cause of action in federal court under the ICRA against the Tribe or its officers. 436 U.S. at 59-72. As the court of appeals recognized (Pet. App. A10-A11), this explicit holding in *Martinez* clearly bars the instant suit against the Tribe and its Revenue Clerk for an alleged violation of the ICRA.

Petitioners contend (Pet. 28-29) that the decision below on this point conflicts with the Tenth Circuit's decision in *Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981), in which the court of appeals permitted a non-Indian to bring a damage action against a Tribe under the ICRA, and that the Court should grant certiorari here to resolve that conflict. We disagree. As an initial matter, the Tenth Circuit's decision in *Dry Creek Lodge* was so flatly inconsistent with this Court's clear holding in *Martinez* that it is not likely to be of significant precedential value, and indeed it has proven to be something of an aberration even in the Tenth Circuit. See *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (distinguishing *Dry Creek Lodge* as a case involving "particularly egregious allegations of personal restraint and deprivation of personal rights"); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982) (same; stressing that a court should be cautious in stripping a Tribe of its traditional immunity). Moreover, it was critical to the Tenth Circuit's holding in *Dry Creek Lodge* that the plaintiff had been denied all access to the tribal court (623 F.2d at 685). Accord *Jicarilla Apache Tribe v. Andrus*, 687 F.2d at 1346. Here, by contrast, as the court of appeals stressed (Pet. App. A11), petitioners did *not* seek to present their ICRA claim to the Tribal Court. See page 8, *supra*. There thus is no conflict between the holding below and that in *Dry Creek Lodge* with respect to the existence of an implied right of action under the ICRA where the plaintiff has not exhausted his tribal remedies.

An exhaustion requirement would be appropriate even if a right of action can be implied under the ICRA in cer-

tain circumstances, notwithstanding the Court's clear holding to the contrary in *Martinez*. Initial resort to tribal processes as a precondition to filing suit in federal court would respect at least in some measure the principles of tribal self-government stressed in *Martinez*, in which the Court made clear that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 436 U.S. at 65 (footnote omitted). The area of taxation is one in which this Court has recognized the strong congressional policy against interference by federal courts with administration of tax laws where, as here, there is another available remedy afforded by the taxing entity, such as a suit for a refund. See, e.g., *California v. Grace Brethren Church*, 457 U.S. 393, 407-419 (1982). Moreover, even if the differing tax rates adopted by the Quinault Nation to encourage the hiring of tribal members were held to violate the equal protection guarantee of the ICRA (but see *Morton v. Mancari*, 417 U.S. 535 (1974)),<sup>6</sup> it would not follow that the entire tax ordinance would fall and that petitioners would be excused from paying any tax. The equal protection violation could be just as readily remedied by a holding that the special tax credit for an employer who hires tribal members is severable from the remainder of the tax provisions, with the result that the higher tax rate would be applied to Indian employees as well as non-Indian employees. See *Heckler v. Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 10-11. The Tribal Court therefore should be given an opportunity to pass on petitioners' contention in the first instance because of the possibility that the tax

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<sup>6</sup> Congress itself has provided an exemption from Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, for an employer who grants a preference to Indians in hiring on or near a reservation. 42 U.S.C. 2000e-2(i). There accordingly is no reason to believe that the Quinault Nation's limited tax incentive to hire Indians is inconsistent with congressional policy.



credit for employees who are tribal members could be severed.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

REX E. LEE

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MAY 1984



U.S. Department of Justice  
Office of the Solicitor General

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Washington, D.C. 20530

May 9, 1984

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MAY 9 1984

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Honorable Alexander L. Stevas  
Clerk  
Supreme Court of the United States  
Washington, D. C. 20543

Re: Kenneth R. Snow, et al. v. Quinault Indian Nation,  
et al., No. 83-595

Dear Mr. Stevas:

On May 2, 1984, we filed a brief in this case in response to the Court's invitation. Although it had recently been rendered, we overlooked and did not bring to this Court's attention the decision of the Tenth Circuit in White v. Pueblo of San Juan, 728 F.2d 1307 (March 9, 1984), which we believe relevant to the Court's consideration of the petition for certiorari. We have enclosed herewith a copy of the opinion in White.

At pages 17-20 of our amicus curiae brief, we argue that the Ninth Circuit correctly held that petitioners do not have a cause of action against the Tribe and its Revenue Clerk in federal court under the Indian Civil Rights Act (25 U.S.C. 1302(8)) in the circumstances of this case. We further argue that the holding below on this point does not conflict with the decision in Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981), because in Dry Creek Lodge the plaintiffs had been denied all access to tribal court to present their claim, while in this case petitioners never even sought in Tribal Court or before the Tribe's Department of Revenue to challenge the application of the Tribe's business tax to them.

The Tenth Circuit's recent decision in White v. Pueblo of San Juan now explicitly confirms that Dry Creek Lodge is to be limited in the manner we suggested. In White, the Tenth Circuit stressed that Dry Creek Lodge "must be regarded as requiring narrow interpretation in order not to come into conflict with the decision of the Supreme Court in [Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)]" (728 F.2d at 1312) and that the exception to tribal sovereign immunity recognized in Dry Creek Lodge applies only where the plaintiff first sought but was denied all access to tribal court for presentation of his claim (728 F.2d at 1312-1313). The Tenth Circuit accordingly affirmed the dismissal of the suit under the ICRA in White because the plaintiffs had not sought to present their claim in tribal forums. Since petitioners in this case likewise did not even seek to present their claims to a tribal forum, it is clear that there is no conflict between the Ninth Circuit's decision affirming the dismissal of petitioner's ICRA claim in the instant case and the Tenth Circuit's decisions in Dry Creek Lodge and subsequent cases.

I will appreciate your bringing this letter and the opinion in White to the Court's attention. We are submitting the matter in this form because the Court's Rules do not provide for a supplemental brief amicus curiae.

Sincerely,

Rex E. Lee  
Solicitor General

cc: Honorable Kenneth O. Eikenberry  
Attorney General  
State of Washington  
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("a trial court should not grant summary judgment for a defendant if there is a 'viable issue of fact' as to when the limitations period began").

[2] Whether the limitations period here at issue ran depends on the factfinder's view of the facts. Wolf contends that he received repeated assurances from his insurance agent that apparent disparities between his purported contract and the company's actions would be corrected. Wolf claims that even when his agent finally acknowledged the disparity, Wolf did not know that the company would disavow the agent's representations. According to Wolf, he only had notice of a possible fraud when he received the June 1, 1977 letter from the company, denying liability for its agent's representations. The Company claims that Wolf had notice many years before this action that the agent's misrepresentation did not match the company's performance. The company claims this disparity put him on notice of possible fraud, and should have led a reasonable person to investigate.

In a review of the district court's order of summary judgment, the plaintiff has a right to have the facts and the reasonable inferences therefrom analyzed in the light most favorable to the plaintiff. *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977). So viewed, there appear to be material facts in dispute, the resolution of which are critical to the issue before this court. Questions of when a reasonable person would discover an injury and what a reasonable person would have done are generally within the province of the jury. See *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1369 (9th Cir.1978) ("the conflicting assertions ... about what a reasonable investor would have known presented issues of the type usually reserved for juries" and summary judgment was inappropriate). In the face of conflicting evidence on the issues of Wolf's knowledge and the reasonable response thereto, the issues ought to have gone to the jury. Summary judgment was thus inappropriate in this case.

Accordingly, the decision of the district court must be reversed and the cause must be remanded for proceedings consistent with this opinion. The importance of this case demands a full factual hearing on the question of when the statute of limitations commenced to run.



Joseph R. WHITE and Stephani L.  
White, his wife,  
Plaintiffs-Appellants,

v.

PUEBLO OF SAN JUAN,  
Defendant-Appellee.

No. 83-1104.

United States Court of Appeals,  
Tenth Circuit.

March 9, 1984.

The United States District Court for the District of New Mexico, Santiago E. Campos, J., dismissed an action for lack of subject-matter jurisdiction. On appeal by the plaintiffs, the Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) Case law exception to traditional sovereign immunity bar against suits against Indian tribes in federal courts is narrow, and under it, aggrieved party must actually have sought to exercise any tribal remedy, which, if it exists, is exclusive, and (2) court had no jurisdiction over suit under Indian Civil Rights Act by non-Indian plaintiffs who, without seeking relief from Indian tribal council, alleged that defendant Indian tribe by intimidation compelled plaintiffs to sell their property within the reservation to the tribe.

Affirmed.

## 1. Indians — 27(1)

Case law exception to traditional sovereign immunity bar against suits against Indian tribes in federal courts is narrow, and under it, aggrieved party must actually have sought to exercise any tribal remedy, which, if it exists, is exclusive. Civil Rights Act of 1968, §§ 201 et seq., 201-203, 202(5, 8), 25 U.S.C.A. §§ 1301 et seq., 1301-1303, 1302(5, 8).

## 2. Indians — 27(2)

Federal court had no jurisdiction over suit under Indian Civil Rights Act by non-Indian plaintiffs who, without seeking relief from Indian tribal council, alleged that defendant Indian tribe by intimidation compelled plaintiffs to sell their property within the reservation to the tribe. Civil Rights Act of 1968, §§ 201 et seq., 201-203, 202(5, 8), 25 U.S.C.A. §§ 1301 et seq., 1301-1303, 1302(5, 8).

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Before McWILLIAMS and DOYLE, Circuit Judges, and CHILSON, District Judge.\*

WILLIAM E. DOYLE, Circuit Judge.

This is an appeal from the judgment of the United States District Court for the District of New Mexico which granted defendant's motion for summary judgment and dismissal of an action. The basis was lack of subject matter jurisdiction. The issues that are presented on appeal are:

1. WHETHER THE DOCTRINE OF SOVEREIGN IMMUNITY PRECLUDES FEDERAL COURT JURISDICTION OVER A CLAIM FOR

DAMAGES UNDER THE INDIAN CIVIL RIGHTS ACT BY A NON-INDIAN AGAINST THE PUEBLO OF SAN JUAN INDIAN TRIBE.

2. IN THE EVENT A FEDERAL COURT DOES HAVE JURISDICTION OVER SUCH A CLAIM, WHETHER THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT AND DISMISSED THE CASE ON THE BASIS THAT PLAINTIFFS' ALLEGATIONS DID NOT RISE TO THE LEVEL OF A CIVIL RIGHTS DEPRIVATION COGNIZABLE UNDER THE INDIAN CIVIL RIGHTS ACT.

## I.

This case arises from the filing of a suit for damages by non-Indians, the Whites, against the Pueblo of San Juan Indian Tribe. Plaintiffs owned in fee simple a plot of land located within the boundaries of the Pueblo of San Juan tribal reservation. The Whites wished to sell the land and in order to bring this about obtained appraisals of its value, and entered into negotiations with a non-party, namely the Delancy Street Foundation, which owned adjacent land. The Whites were asking \$140,000 and, according to them, they agreed to a price of \$120,000 with the Delancy Street Foundation.

The Indian tribe sought purchase of the property also. It was claimed by the Whites that in an effort to obtain the land, the tribe threatened and intimidated them in order to force them to sell the property to the tribe. The Whites allege that the wrongful conduct by tribal officials, including the excavation of a wide trench across a dirt access road which connected the Whites' property with the adjacent Delancy Street Foundation property, thereby prohibiting access between the properties, caused the Delancy Street Foundation to refuse to close the sale. The Pueblo denies that there was any such wrongful conduct

\* Honorable Howard Chilson, Senior United States District Judge for the District of Colorado, sitting by designation.



or improper motives and alleges that disagreement over the purchase price caused the Delancy Street Foundation's refusal to close the deal.

On May 16, 1979, the Whites conveyed the property to the United States of America in trust for the Pueblo in exchange for \$75,000.00. The Pueblo maintains that the fairness of the sales price is supported by an appraisal of the Realty Office, Bureau of Indian Affairs, United States Department of the Interior. This appraisal was in the amount of \$76,000.00. However, the Whites allege that as a result of the Pueblo's harassment, threats, and intimidation, they conveyed title to the Pueblo under duress for an inadequate consideration. The Whites do not contend they complained of such duress to the Bureau of Indian Affairs, Department of Interior; nor do they contend that they submitted a formal complaint to the Tribal Council or Tribal Court. Rather, the Whites allege that they were unaware of any tribal redress procedure and complained of the alleged duress and wrongful conduct only to the then-tribal governor Garcia, Congressman Manuel Lujan, and defendant's counsel, Lamar Parrish.

The Whites filed suit in the United States District Court for the District of New Mexico on August 4, 1981. This was over two years after the conveyance of the property to the United States in trust for the Pueblo. The allegation in this complaint was that the wrongful conduct by the tribe and interference with an agreement between the Whites and the Delancy Street Foundation, constituted civil rights deprivations pursuant to § 1302(5) (deprivation of property without due process and also taking of property without just compensation) contrary to § 1302(8) of the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*, (hereinafter the ICRA). The Pueblo counterclaimed in which it alleged misrepresentations by the Whites regarding the good repair of the conveyed property.

The Pueblo filed a motion for summary judgment and to dismiss, alleging that the Whites failed to exhaust administrative and

tribal remedies and that the complaint was barred by the doctrine of sovereign immunity. The tribe subsequently filed a supplemental motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief may be granted.

The district court dismissed the Whites' claims and found that they failed to state a valid claim under the ICRA, and alternatively, that the doctrine of sovereign immunity barred the action. The court denied the Whites' subsequent motion to stay dismissal pending pursuit of tribal remedies. The Whites now appeal the dismissal of their claims and in the alternative, the court's refusal to retain jurisdiction and stay dismissal until pursuit of tribal remedies.

Inasmuch as it appears from the weight of authority that the jurisdictional issue of sovereign immunity is dispositive of this appeal, the parties' positions regarding this issue only will be discussed here. Accordingly, the parties' contentions regarding whether the activities complained of rise to the level of civil rights deprivations under the ICRA will not be discussed.

The position of the Whites is that they acknowledge that resolution of the tribal sovereign immunity issue involves an application and reconciliation of the decision of the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) holding that federal courts do not have jurisdiction to hear claims against Indian tribes under the ICRA except in habeas corpus proceedings; and *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981), *reh. den.*, 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385. There this court announced an exception to *Santa Clara* when it held that federal jurisdiction existed under the facts of the case. The Whites contend that their suit in federal court against the Pueblo of San Juan Tribe is not barred by the doctrine of sovereign immunity, because they satisfy the three requirements for federal court jurisdiction, allegedly enumerated by this court

in *Dry Creek*. The Whites argue those requirements are:

1. involvement of a non-Indian in the action.
2. the alleged deprivation of an individual's real property interests; and
3. the absence of an adequate tribal remedy.

The Whites interpret *Dry Creek* as limiting the language of *Santa Clara* quoting:

... the reason for the limitation [against suing Indian tribes] and the references to tribal immunity [in *Santa Clara*] also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian.

*Dry Creek*, *supra*, at 685. Accordingly the Whites maintain the federal district court possessed jurisdiction to hear their claims against the Pueblo for deprivation of civil rights under the ICRA, because non-Indians were involved and because the controversy did not merely involve internal tribal affairs.

The Whites also maintain that even if *Dry Creek* is interpreted narrowly to permit federal jurisdiction only in the absence of trial remedies, such federal jurisdiction exists under the facts of this case. The Whites allege that the Tribal Code of Law and Order for the People of San Juan, establishing the Tribal Court, was not properly adopted and published. Consequently, they contend, they cannot be barred from federal court for failure to exhaust the tribal remedies, citing *Genuine Parts Company v. Federal Trade Commission*, 445 F.2d 1382, 1394 (5th Cir.1971). This latter case held that a party was not barred from seeking judicial review of an administrative agency determination for failure to exhaust an uncertain, informal administrative remedy, at the time unreported in the Federal Register.

Furthermore, the Whites argue that even if the Code was validly adopted, the existence of the Tribal Court does not defeat federal jurisdiction, because the Tribal Court does not have jurisdiction over this type of civil action involving a non-Indian.

They cite the Code's absence of an explicit jurisdictional grant in civil actions between the tribe and non-Indians and the requirement that in civil actions Tribal Court jurisdiction is predicated on the consent of the non-Indian party. Also argued by the Whites is that even if the Code is read to confer Tribal Court jurisdiction over this type of action, it is probably invalid, because there is no congressional authorization nor is the matter material or essential to tribal self-government, citing *UNC Resources, Inc. v. Benally*, 514 F.Supp. 358 (D.N.M.1981) (holding Navajo tribal Code ineffective as to conferral in tribal courts of civil jurisdiction over non-Indians as defendants). Accordingly, the Whites draw the conclusion that no valid tribal forum exists to redress the alleged deprivations, and, therefore, under the *Dry Creek* exception to Indian sovereign immunity, the federal district court had jurisdiction.

Our conclusion is not in accord with the statement just made because we are of the conclusion that the Indians enjoy immunity in this situation. The Pueblo of San Juan Indians contend that under the explicit holding of the United States Supreme Court in *Santa Clara*, the federal courts lack jurisdiction to hear complaints under the ICRA, except in habeas corpus proceedings. The Pueblo asserts that this case cannot be brought within this court's limited exception to the doctrine of tribal sovereign immunity of *Dry Creek*, because that decision is distinguishable from the present case.

The Pueblo contends that *Dry Creek* must be narrowly interpreted within the doctrinal confines of *Santa Clara*, and as such it merely held that federal jurisdiction existed because no other remedy was available due to the denial of access to tribal forums.

As to the availability of tribal remedies in this case, the Pueblo maintains that a Tribal Court and Tribal Council existed and each possessed jurisdiction and authority to address the Whites' complaints. The Pueblo further contends that the Whites never attempted to avail themselves of these trib-



al forums, choosing instead to go directly to federal court. The Pueblo further asserts that the Whites failed to avail themselves of administrative remedies available with the Department of Interior which held the purchased property in trust for the Pueblo.

## II.

*Santa Clara* is an opinion by the Supreme Court of the United States. The action was brought in federal court against the Santa Clara Pueblo tribe by a female member of the tribe who married a Navajo Indian and had several children. Two years prior to her marriage, the Pueblo passed a membership ordinance barring membership in the Pueblo to children of female members who marry outside the tribe, while permitting membership to children of male members who marry outside the tribe. The denial of such membership in the Pueblo precluded the children from voting in tribal elections, holding secular office, and inheriting their mother's home and possessory interest in the tribal communal lands. She claimed that this tribal ordinance discriminated on the basis of both sex and ancestry in violation of Title II of the ICRA, 25 U.S.C. §§ 1301-1303. She sought injunctive and declaratory relief in a civil action in federal court.

However, the Supreme Court holding was that the ICRA could not be interpreted to impliedly authorize an action in federal courts against an Indian tribe or its officers for deprivation of the Act's substantive rights. The Court applied the longstanding rule that absent congressional authorization Indian tribes are exempt from suit under the doctrine of sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940). The holding was that nothing on the face of the ICRA purported to waive that sovereign immunity and subject tribes to the jurisdiction of federal courts in civil action for injunctive or declaratory relief. *Santa Clara*, *supra*, 436 U.S. at 59, 98 S.Ct. at 1677. The only remedy in federal courts expressly authorized by Congress in the ICRA is a writ of habeas corpus to test the

legality of a detention by order of an Indian tribe. 25 U.S.C. § 1303. Therefore, the Court concluded that except for habeas corpus proceedings suits against Indian tribes for deprivation of substantive rights recognized in the ICRA are barred by sovereign immunity. *Santa Clara*, *supra*, 436 U.S. at 59, 98 S.Ct. at 1677.

The case of *Dry Creek* is a post-*Santa Clara* Tenth Circuit decision which recognizes an exception to that decision's bar from suit in federal court pursuant to the doctrine of Indian sovereign immunity. Plaintiffs in *Dry Creek* were non-Indians who owned in fee a parcel of property within the boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indian Tribes. In 1974 plaintiffs built a small inn or hotel, called the Dry Creek Lodge. This was a stopping off place for persons entering wilderness areas. A dirt access road linked the lodge to the highway and traversed the property of the Bonatsies family. This was an Indian family. On the day the lodge formally opened, the Joint Business Council of the two tribes and the superintendent of the Reservation closed the access road at the request of the Bonatsies and blocked ingress and egress from the lodge by way of that road.

The plaintiffs sought a remedy with the tribal court. This the judge refused, claiming the court lacked jurisdiction absent the consent of the Tribal Council. The Council refused consent and directed that the Bonatsies and the plaintiffs resolve their differences through self-help. Plaintiffs' claims against the Indians under the ICRA, originally filed in state court, were then removed to the federal court.

The majority in *Dry Creek* distinguished *Santa Clara* and held that the federal district court possessed jurisdiction to entertain an action for damages and injunctive relief against the Indian tribes pursuant to the ICRA, but Judge Holloway dissented. He concluded that the Supreme Court decision in *Santa Clara* compelled dismissal of the claims against the tribes and precluded the court's creation of an exception to the doctrine of Indian sovereign immunity.

## III.

[1.2] The rationale behind the holding of the Tenth Circuit in *Dry Creek* was based upon what the court regarded as absolute necessity. In other words, to deny relief meant that the persons who had built the hotel could not gain access to it, nor could they attract members of the public. Necessarily the *Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara*. Accordingly, the *Dry Creek* decision ought to be interpreted to provide a narrow exception to the traditional sovereign immunity bar from suits against Indian tribes in federal courts. In addition, to adhere to the principles of *Santa Clara*, the aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility. This is not merely a requirement that the exhaustion of tribal remedies is a prerequisite to federal jurisdiction, but instead, that tribal remedies, if existent, are exclusive. Judged in this light the Pueblo are immune from this suit for damages under the ICRA and the district court's dismissal of the action is to be affirmed.

It is to be noted that in *Dry Creek* the plaintiffs made an actual attempt to pursue a remedy in the tribal forum. But access was denied. This in itself is a distinguishing factor from *Santa Clara*. Nonetheless in the *Dry Creek* case it was also pointed out that it was outside of internal tribal affairs and concerned itself with an issue with a non-Indian. *Dry Creek*, *supra*, at 685.

This language just referred to was considered important by the parties in this case; however, there can be no expansive interpretation of *Dry Creek* without opening up the scope of lawsuits against tribes. Throughout our history the tribes have been regarded as not being constrained by the Constitution's limitations on federal and state authority. *Santa Clara*, *supra*; *Tal-*

*ton v. Mayes*, 163 U.S. 376, 16 S.Ct. 956, 41 L.Ed. 196 (1896). The *Talton* case holds that the fifth amendment did not restrict the governmental powers of the tribes. Additionally, the judicial doctrine of tribal sovereign immunity has long protected Indian tribes from suit in state and federal courts. Tribal immunity, like all aspects of tribal sovereignty, is subject to the superior and plenary control of Congress. But until Congress expressly acts, we are governed by *Santa Clara*. Exercising that plenary authority in 1968, Congress passed the ICRA which provides individual persons with statutory rights similar, but not identical, to many of the parallel constitutional protections enjoyed by individuals against the state and federal governments.<sup>1</sup>

The ICRA, prior to *Santa Clara*, was looked upon as a general waiver of tribal immunity from civil actions in federal courts. The Supreme Court in *Santa Clara* reversed these decisions and held that the ICRA was not to be interpreted as an unequivocal congressional general waiver of tribal immunity in federal courts. *Santa Clara*, *supra*, 436 U.S. at 59, 98 S.Ct. at 1677. The Supreme Court distinguished the creation of the substantive rights under the ICRA from the provision of a federal forum for the vindication of those rights; the Court concluded that the implication of a federal remedy is not required to give effect to Congress' objective of extending constitutional norms to tribal self-government. *Id.* at 65, 98 S.Ct. at 1680. The Court stated that these substantive rights created by the ICRA must be vindicated through tribal forums which are obliged to apply the statute. *Id.* The Court observed that tribal forums have repeatedly been recognized as adequate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. *Id.* at 66, 98 S.Ct. at 1681. The Court also recognized that non-judicial tribal institutions—such as

1. The protections afforded to "any person" under the ICRA are not limited to American Indians, but apply also to non-Indians. *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th

Cir.1975) (*Dry Creek I*) appealed after remand on other grounds, 623 F.2d 682 (1980); *Dodge v. Nakai*, 298 F.Supp. 17 (D.Ariz.1968).

tribal councils—are competent adjudicatory forums. *Id.*

This broad definition of tribal immunity and the Supreme Court's concern for restricting federal intrusions into tribal self-government would be undermined if this court would further limit the immunity applicable to the tribes. It seems plain that the plaintiffs in this suit fail to come within *Dry Creek* exception to tribal immunity.

The Whites at no time filed a complaint with the Tribal Council or Tribal Court. The evidence merely reveals that they complained once orally to then-Governor Garcia in the spring of 1979 and to the Pueblo's lawyer, Lamar Parrish. The explanation given with respect to their failure to seek tribal remedies is a consequence of their belief that tribal remedies did not exist; but that is not really the equivalent of pursuing the remedy nor can there be any justification for this failure. It was insufficient to allege that they felt that it would be futile to pursue the remedy even if they did believe that. It was not until February 10, 1982 that the Whites contacted the Office of the Tribal Judge of the Pueblo of San Juan and requested a copy of the Code of Law and Order for the People of San Juan Pueblo. See Plaintiff's Supplemental Memorandum of Authority in Response to the Defendant's Motion for Summary Judgment and Motion to Dismiss (ROA at 66). No explanation for their apparent failure to make a request prior to the initiation of this action in federal court is given.

The receipt of the Tribal Code certainly put the Whites on notice of the possible existence of a forum for the hearing of their complaint. However, it is uncontested that they made no affirmative steps to seek redress through the tribal judiciary. The Whites chose instead to continue this action in federal court, claiming that their refusal to pursue a tribal remedy is excusable on the basis of futility. But this is not the law in the Tenth Circuit; speculative futility is not enough to justify federal jurisdiction. The tribal remedy must be shown to be nonexistent by an actual attempt before a federal court will have jurisdiction. The

contention of the Whites that a valid tribal remedy is nonexistent is a contention without any merit.

In *Santa Clara*, the Supreme Court held that the substantive rights against Indian Tribes created by the ICRA had to be vindicated through tribal forums which are obligated to apply the statute and recognize the rights. *Santa Clara, supra*, at 65, 98 S.Ct. at 1680. Accordingly federal law requires a waiver of tribal immunity in tribal courts for action under the ICRA. The Pueblo Code explicitly permits such waiver when required by federal law. Code, Chap. I, Section III. It is also clear that the Code specifically asserts civil jurisdiction over non-Indians within the Pueblo boundaries. The Whites contend that the Code's attempted extension of civil authority over non-Indians is ineffective, because it requires non-Indians to consent to the assertion of jurisdiction and to stipulate that they agree to be bound by the Tribal Court's decisions. Apparently, the Whites believe it is improper to compel them to consent to the Tribal Court's jurisdiction; however, this is the inescapable consequence of *Santa Clara*. When they refused to comply with the tribal adjudicatory procedure based on their objection to the adequacy of the procedure, as is shown to have occurred here, we find ourselves powerless to pursue the remedy in federal court as proposed by the Whites. This would be contrary to the restrictive holding by the Supreme Court in *Santa Clara*.

The judgment of the district court is, therefore, affirmed.

